IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD W. TITTERUD, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 97-CV-518-B (M)
	)	
SNAPPY CAR RENTAL, INC., *et al.*	)	
	)	
Defendants.	)	

STIPULATION FOR DISMISSAL WITH PREJUDICE

Plaintiffs Richard W. Titterud; Richard W. Titterud, as custodian for Eric P. Titterud; Karla Titterud; Vickie Titterud Johnson; and Steven Titterud, by and through their attorney, Nancy Glisan Gourley, Esq., and Snappy Car Rental, Inc., Benjamin R. Jacobson; JP Acquisition Group, C.V.; JP Acquisition Fund. L.P; Snappy Acquisition Fund, L.P.; James F. Wilson; Amcito Partners; Michael J. Fuchs; George A. Kellner; Gerald L. Parsky; SCR Acquisition Group, C.V.; Deanstreet Associates; Dennis Pedra; Kendrick R. Wilson III, trustee under the James F. Wilson Irrevocable Family Trust, dated January 12, 1995; Michael J. Fuchs, trustee under the trust agreement dated March 8, 1989 for the benefit of Nicholas Karlson; and Michael J. Fuchs, trustee under the trust agreement, dated December 21, 1987 for the benefit of Sara K. Jacobson (collectively "Defendants") by and through their attorneys, Conner & Winters, P.C., hereby stipulate, pursuant to Rule 41 (a)(1)(ii) and (c) of the Federal Rules of Civil Procedure to dismiss this action with prejudice, each party to pay his or its own costs, expenses, and attorneys fees.

Dated this 19th day of November, 1998.

Nancy Gilsan Gourley, OBA#10317
Attorney at Law
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Tulsa, Oklahoma 74114-3523
ATTORNEY FOR PLAINTIFFS

J. Ronald Petrikin, OBA#7092
CONNER & WINTERS, P.C.
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Tulsa, Oklahoma 74103-4344
ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROY GREEN)
)
Plaintiff,)
)
vs.) Case No. 97-CV-1143-B
)
TULSA COMMUNITY COLLEGE,)
)
Defendant.)

JUDGMENT

This action came of for hearing before the Court, Honorable Thomas R. Brett, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the Plaintiff, Roy Green, take nothing of the Defendant, Tulsa Community College, that the action be dismissed with prejudice, and that the Defendant, Tulsa Community College, recover of the Plaintiff, Roy Green, its costs of actions upon timely application pursuant to N.D. LR 54.1.

DATED at Tulsa. Oklahoma this 18 day of November, 1998.

THOMAS R. BRETT
UNITED STATED DISTRICT JUDGE

B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROY GREEN)
)
Plaintiff,)
)
vs.) Case No. 97-CV-1143-B
)
TULSA COMMUNITY COLLEGE,)
)
Defendant.)

ORDER

Comes on for consideration Defendant's Motion to Dismiss For Plaintiff's Failure to Comply With Order Compelling Discovery (Docket #11) filed October 22, 1998, and the Court finds the same shall be granted.

Defendant filed Motion to Compel Discovery on September 24, 1998, in which Defendant sought an order from the Court compelling responses to discovery served on Plaintiff on July 16, 1998. Accordingly, response would have been due on or about August 16, 1998. Defendant's motion sets forth numerous attempts to resolve the discovery issue with Plaintiff's counsel without court intervention which met with continuing assurances that the responses would be forthcoming. Defendant filed its motion when it became clear that the various dates set by the Court in its scheduling conference could not be met. The motion also recites Plaintiff's failure to provide witness list as ordered.

In response to the motion, the Court entered an Order on September 28, 1998, ordering Plaintiff to provide the discovery on or before October 1, 1998 and further directing Plaintiff to file response to that part of Defendant's motion requesting an extension of certain dates set by the Court on or before October 2. The Court also directed Plaintiff to include any mitigating circumstances as to why the Court should not award attorney's fees to Defendant for the necessity of filing the Motion to Compel.

On October 7, 1998, six (6) days beyond the ordered date of production, Plaintiff filed response to the motion to compel discovery containing a request for an unspecified extension of time to comply with the Court's order. Plaintiff stated the responses were prepared but unsigned and needed additional information from Plaintiff to be finalized. In response to the Court's inquiry regarding assessment of attorney's fees, Plaintiff primarily recites difficulty of client communication and Plaintiff's inability to pay any fees assessed. Plaintiff states he has no objection to the Court extending previously set deadlines toward trial.

The Court granted an additional extension of time to respond to the discovery. No additional motions were filed by Plaintiff. However, on October 22, 1998, well beyond any reasonable time within which to comply with the Court's orders, Defendant's filed the Motion Dismiss asserting Plaintiff had still not provided the discovery.

Response to the Motion to Dismiss was due on or before November 9, 1998, yet none has been filed nor has any extension to file response been sought. The Court therefore finds the Motion to Dismiss is deemed confessed pursuant to N.D. LR 7.1 C.

The Court further finds the Motion to Dismiss should be granted pursuant to Fed. R. Civ. P. 37(b)(2), for failure of Plaintiff to comply with the Court's Order Compelling Discovery entered September 28, 1998.

As additional grounds, the Court finds Dismissal is appropriate for failure of Plaintiff to prosecute pursuant to Fed. R. Civ. P. 41.(b).

IT IS THEREFORE ORDERED that this case be dismissed with prejudice. Defendant is awarded its costs of action upon timely application pursuant to N.D. LR 54.1 A. An award of attorney's fees is hereby denied.

DONE THIS 18 DAY OF November, 1998.

THOMAS R. BRETT
UNITED STATED DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MELVIN EARL AMES,

Petitioner,

vs.

No. 95-C-1182-B (J)
(Base File)

No. 96-C-477-B

EDWARD L. EVANS,

Respondent.

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge (#26) filed on September 24, 1998, in this consolidated habeas corpus action brought pursuant to 28 U.S.C. § 2254. In his Report, the Magistrate Judge concludes that Petitioner was denied effective assistance of counsel, and was denied a direct appeal due to the deprivation of his right to counsel. The Magistrate Judge recommends that this Court conditionally grant a writ of habeas corpus to Petitioner to enable Petitioner to file a direct appeal, out of time, from the acceleration of his deferred sentences. Neither party has filed an objection to the Report, and the time for filing an objection has passed.

Having reviewed the Report and the facts of this case, pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court concludes that the Report should be adopted and affirmed and the petition for writ of habeas corpus should be conditionally granted. The due process clause of the Fourteenth Amendment guarantees effective assistance of counsel on first appeal as of right. Evitts v. Lucey, 469 U.S. 387 (1985). Citing Baker v. Kaiser, 929 F.2d 1495 (10th Cir. 1991) (holding that the right to counsel "applies to the period between the conclusion of

trial proceedings and the date by which a defendant must perfect an appeal"), the Magistrate Judge found, and this Court agrees, that Petitioner established a violation of his right to effective assistance of counsel on appeal.

An attorney renders ineffective assistance only if (1) his performance was deficient and (2) the defendant suffered prejudice as a result of the deficient performance. Strickland v. Washington, 466 U.S. 668 (1984). Although the Strickland test was formulated in the context of evaluating a claim of ineffective assistance of trial counsel, the same test is used with respect to appellate counsel. See, e.g., Claudio v. Scully, 982 F.2d 798, 803 (2d Cir. 1992). In the instant case, the evidence demonstrates Petitioner's counsel failed to perfect a direct appeal on behalf of Petitioner after Petitioner announced in open court, and in front of his counsel, his intention to appeal from the acceleration of his deferred sentences, as entered by the Delaware County District Court, Case Nos. CRF-89-75 and CRF-89-74.[1] This Court agrees with the Magistrate Judge that counsel's performance was deficient and the first prong of Strickland is satisfied.

Turning to the second prong of Strickland, the Court must also consider whether Petitioner was prejudiced as a result of the deficient performance. Clearly, Petitioner lost his direct appeal due to his attorney's deficient performance. Because Petitioner's post-conviction remedy is not a substitute for a direct appeal, see Okla. Stat. tit. 22, § 1086; Brown v. State, 933 P.2d 316, 325-26 (Okla. Crim. App. 1997); Castro v. State, 880 P.2d 387, 390 (Okla. Crim. App. 1994) (citing

[1]On August 12, 1992, Petitioner's deferred sentences were accelerated to 15 years imprisonment with 10 years deferred in CRF-89-75 (Unlawful Delivery of a Controlled Drug) and to 15 years imprisonment in CRF-89-74 (Possession of a Controlled Drug with Intent to Distribute). The sentence in CRF-89-75 is to run consecutive to the sentence in CRF-89-74 (#12, Sentencing Hearing Transcript at 344). In addition, in Delaware County District Court, Case No. CRF-92-70, Petitioner received a sentence of life without parole after being convicted of Trafficking After Former Conviction of a Felony. In his Report, the Magistrate Judge states that at the evidentiary hearing held in the instant case, counsel for Petitioner advised that Petitioner had "successfully" challenged on appeal the life without parole sentence and it had been modified to a sentence of "life."

Johnson v. State, 823 P.2d 370, 372 (Okla. Crim. App. 1991); Cartwright v. State, 708 P.2d 592, 593 (Okla. Crim. App. 1985); Jones v. State, 704 P.2d 1138, 1140 (Okla. Crim. App. 1985)), the Court finds that prejudice is presumed and Petitioner has satisfied the second prong of the Strickland standard. See Evitts, 469 U.S. at 394 n.6; Hannon v. Maschner, 845 F.2d 1553, 1558-59 (10th Cir. 1988); Bell v. Lockhart, 795 F.2d 655, 658 (8th Cir. 1986).

The Court concludes that Petitioner has established a violation of his constitutional right to effective assistance of counsel on appeal and is, therefore, entitled to a conditional grant of habeas corpus relief.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation of the Magistrate Judge (Docket #26) is **adopted and affirmed**.

2. The petition for writ of habeas corpus is **conditionally granted** as follows: within ninety (90) days of the entry of this Order, the State of Oklahoma shall appoint new counsel for Petitioner and allow Petitioner to commence an appeal out of time from the August 12, 1992 acceleration of his deferred sentences entered by the District Court of Delaware County, Case Nos. CRF-89-75 and CRF-89-74, failing which the State of Oklahoma shall grant Petitioner a new trial in those cases.

3. Any pending motion is **denied as moot**.

SO ORDERED THIS 17th day of Nov, 1998.

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHURCH & TOWER FIBER TEL, INC.,

Plaintiff,

vs.

WILLIAMS COMMUNICATIONS, INC., formerly known as VYVX, INC.,

Defendant.

Case No. 98-CV-0639 H(M)

ENTERED ON DOCKET

DATE 11-20-98

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, Plaintiff, Church & Tower Fiber Tel, Inc., and Defendant, Williams Communications, Inc., formerly known as Vyvx, Inc., hereby stipulate that all claims asserted by Plaintiff in this action and all counterclaims asserted by Defendant in this action are hereby dismissed, with each party to bear its own costs and attorneys fees. This dismissal is with prejudice except as to such claims as have been reserved under the settlement agreement between the parties.

DATED this 19th day of November, 1998.

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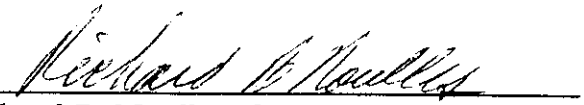
ATTORNEYS FOR PLAINTIFF

173590



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ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TAMMY JOHNSON and GERALDINE QUINTON,

Plaintiffs,

vs.

TEXACO, INC. and its affiliate, PETROMAN, INC., corporations, and ERIC ANDERSSEN,

Defendants.

Case No. 97-CV-1063-M

ORDER

The following motions are before the court: DEFENDANT TEXACO INC.'S MOTION FOR SUMMARY JUDGMENT [Dkt. 21]; PLAINTIFFS' THIRD MOTION TO AMEND PETITION [Dkt. 28].

MOTION FOR SUMMARY JUDGMENT

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if the pleadings, affidavits and exhibits show that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). To survive a motion for summary judgment, the nonmoving party "must establish that there is a genuine issue of material fact" and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,

(61)

475 U.S. 574, 585-86, 106 S.Ct. 1348, 1455-56, 89 L.Ed.2d 538 (1986). However, the factual record and reasonable inferences to be drawn therefrom must be construed in the light most favorable to the non-movant. *Gullickson v. Southwest Airlines Pilots' Ass'n.*, 87 F.3d 1176, 1183 (10th Cir. 1996).

The claims in this lawsuit arise out of a series of incidents which Plaintiffs allege occurred while they were employed as convenience store clerks in a Starmart in Catoosa, Oklahoma. Texaco has asserted, and Plaintiffs have offered no evidence to dispute, the following material facts:

1. Texaco neither owns nor operates the Catoosa Starmart where Plaintiffs were employed.

2. Neither Plaintiffs nor their supervisors were employed by Texaco.

3. Plaintiffs were employed by Petroman.

4. Petroman is in the business of supplying certain categories of employees to retail outlets owned by Texaco Refining and Marketing Inc., such as the Catoosa Starmart.

4. Petroman is a wholly-owned subsidiary of Texaco Refining and Marketing Inc., which itself is a wholly-owned subsidiary of Texaco, Inc.

5. Texaco, Inc. does not directly own any Petroman stock and does not share any common officers or directors with Petroman.

In light of the lack of any dispute over the foregoing facts, the Court finds there is no basis upon which to impose liability for Plaintiffs' alleged damages against

Texaco, Inc. Accordingly, Texaco Inc.'s Motion for Summary Judgment [Dkt. 21] is GRANTED.

PLAINTIFFS' THIRD MOTION TO AMEND

Plaintiffs seek to amend their complaint to substitute Texaco Marketing and Refining Inc. ("TMRI") in place of Texaco, Inc. as a party defendant. By Order entered April 8, 1998, the deadline for joinder of additional parties was set for May 31, 1998. Without any citation to authority or reference to the factual context of this case, Plaintiffs have asserted their belief that further discovery will establish that TMRI is either a joint employer of the plaintiffs, or an employer integrated with Petroman for purposes of their Title VII claims. Pursuant to Fed.R.Civ.P. 15(a), leave to amend pleadings is to be freely given "when justice so requires." There has been no showing that justice requires Plaintiffs' proposed amendments. Accordingly, Plaintiffs' Third Motion to Amend [Dkt. 28] is DENIED.

SO ORDERED this 19th Day of November, 1998.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAURICE VAN DUSEN,

Plaintiff,

vs.

SMITH & NEPHEW, INC.,

Defendant.

No. 97-CV-1073-K

FILED

NOV 19 1998

ORDER

Before the Court is the motion of the defendant to dismiss or for judgment on the pleadings. Plaintiff filed his original complaint on December 5, 1997. It named as defendants Richard's Inc., identified as a Tennessee corporation transacting business in Oklahoma, and Dr. George Mauerman, identified as a physician licensed and practicing in Oklahoma. Plaintiff alleged that on November 5, 1994, a metal rod was inserted in his femur in a surgical procedure performed by defendant Mauerman. The complaint alleged that the rod was manufactured by defendant Richard's Inc., and that plaintiff was made aware on or about December 12, 1995 that the rod had malfunctioned. The complaint alleged a claim of product liability against Richard's Inc. and a claim of medical negligence against Mauerman.

On March 17, 1998, plaintiff filed a motion to dismiss Richard's Inc. and an amended complaint which named as defendants Mauerman and "Smith & Nephew Richards, Inc.", identified as a Delaware corporation transacting business in Oklahoma. Movant then filed the present motion, stating that its proper name is Smith &

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Nephew, Inc. The basis for requested dismissal was that defendant Mauerman was an Oklahoma resident, thereby precluding diversity jurisdiction, and that the statute of limitation had expired. On May 15, 1998, plaintiff dismissed Mauerman from this action, thereby removing that basis for dismissal.[1]

The parties have not disputed that, for purposes of the present motion, plaintiff's cause of action accrued on December 12, 1995, when he learned of the allegedly defective rod. Neither has it been disputed that a two-year statute of limitation applies to product liability actions under Oklahoma law. Kirkland v. General Motors Corp., 521 P.2d 1353, 1361 (Okla.1974). Therefore, plaintiff's initial complaint filed on December 5, 1997 was within the limitation period. However, it named Richard's Inc. as a defendant rather than Smith & Nephew, Inc. This is the crux of the present motion. Plaintiff argues that his naming of Richard's Inc. was a mere "misnomer" and that his amended complaint should relate back to the original filing date, while defendant argues to the contrary.

Generally, "relation back" under Rule 15(c) F.R.Cv.P. is permitted in order to correct a misnomer of a defendant where the proper defendant is already before the court and the effect is merely to correct the name under which it is sued. But a new defendant cannot normally be substituted or added by amendment

[1]The record does not reflect that Mauerman had ever been served in this action, and he had not filed an answer. Therefore, plaintiff could dismiss him as a party without an order of the Court pursuant to Rule 41 F.R.Cv.P.

after the statute of limitation has run. See Worthington v. Wilson, 8 F.3d 1253, 1256 (7th Cir.1993). Defendant has asserted, and plaintiff has not contradicted, that "Richard's Inc. and Smith & Nephew are entirely distinct companies". (Defendant's reply at 4). Thus, the Court declines to characterize the amended complaint as merely correcting a misnomer.

Nevertheless, a new party may be added outside the statute of limitation if certain criteria are satisfied. Under Rule 15(c)(3), these are: (1) the claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining a defense; (3) the party to be brought in must or should have known that but for a mistake of identity the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the period for service of process prescribed by Rule 4(m). Henry v. F.D.I.C., 168 F.R.D. 55, 59 (D.Kan.1996). Plaintiff bears the burden to establish these criteria. Wine v. EMSA Ltd. Partnership, 167 F.R.D. 34, 38 (E.D.Pa.1996).

There is a split of authority as to whether the notice required must be actual or whether constructive notice will suffice. The Tenth Circuit has not resolved the issue, and this Court need not pronounce definitively, because it concludes that plaintiff has failed to meet his burden under either standard. Plaintiff has failed to show that defendant received any sort of notice within the 120-day service period of Rule 4(m), measured

from the date of filing of the original complaint, December 5, 1997. By the Court's calculation, 120 days from that date is April 4, 1998. Defendant was not served with the amended complaint, naming it for the first time, until April 13, 1998. No other showing of actual, or constructive, notice has been made. Plaintiff's counsel has merely cited its "good faith" attempting to serve the proper defendant, but such is insufficient under the language of the Rule.

Similarly, plaintiff has not demonstrated that defendant "knew or should have known" (within the 120-day period) that, but for a mistake concerning identity, this action would have been brought against defendant. Plaintiff asserts that the service agent for Richard's Inc. stated that other parties attempting to serve Smith & Nephew had mistakenly served Richard's Inc., but this does not properly establish timely knowledge on the part of Smith & Nephew.

The Court is aware of the harshness which can result from the application of a statute of limitation, and this case is such an example. However, a danger exists when commencement of the action is made in close proximity to the expiration of the statutory period. This case is also an example of that danger.

It is the Order of the Court that the motion of the defendant Smith & Nephew, Inc. to dismiss (#4) is hereby GRANTED. The alternative motion of the defendant for judgment on the pleadings is declared moot. This Order represents a final order, all other defendants having previously been dismissed.

ORDERED this 13 day of November, 1998.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

HAROLD BRUTON, an individual	*	
	*	CASE NUMBER: 98 CV 0097H(E)
V.	*	
	*	ENTERED ON DOCKET
AIRCRAFT FUELING SYSTEMS, INC., an Oklahoma Corporation, JOSEPH WIGNARAJAH, an individual, and ROBERT PILAND, an individual	*	DATE NOV [illegible] 1998
	*	JURY TRIAL DEMANDED

****

FINAL JUDGMENT OF DISMISSAL WITH PREJUDICE

Considering the Joint Motion to Dismiss With Prejudice in the above-captioned lawsuit:

IT IS ORDERED, ADJUDGED AND DECREED that the above-captioned lawsuit and all of the plaintiff's claims asserted therein be and are hereby dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each party is to bear its own costs of the above captioned proceedings

THUS DONE AND SIGNED on this 18TH day of NOVEMBER, 1998 in TULSA, Oklahoma.

JUDGE

0196369.01

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CLARK ELECTRICAL SUPPLY COMPANY, and Oklahoma corporation,

Plaintiff,

vs.

EATON CORPORATION, a foreign corporation d/b/a CUTLER-HAMMER,

Defendant.

Case No. 98 CV-255H(M)

ORDER OF DISMISSAL

This matter comes on before me, the undersigned Judge, upon the Joint Application of the parties herein for an Order Dismissing Plaintiff's action and Defendant's counterclaim. The Court finds that these matters should be dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above-styled cause of action and Defendant's counterclaim are hereby dismissed with prejudice, without cost to either party.

DATED this 18TH day of November, 1998.

UNITED STATES DISTRICT JUDGE

Prepared by:

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ATTORNEYS FOR DEFENDANT

11006.007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FREDRIC C. ROBIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 97-CV-985-H(M)
	)	
OKLAHOMA GAS AND ELECTRIC COMPANY,	)	
	)	
	)	
Defendant.	)	

ORDER

On this 18TH day of NOVEMBER, 1998, this matter comes on before me, the undersigned judge, pursuant to the Joint Request For Administrative Closure and in accord with Local Rule 41 of the United States District Court for the Northern District of Oklahoma. For good cause shown, the Court finds that the Joint Request should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this case should be and is hereby administratively closed until March 1, 1999. The Court Clerk is directed to take the appropriate actions to administratively close the case as provided herein.

UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DARRYL ANDRIAN BULLOCK,

Plaintiff,

vs.

STANLEY GLANZ, WEXFORD HEALTH SOURCE, INC., and LINDA CALDWELL,

Defendants.

No. 98-CV-608-H (E)

ORDER

On November 4, 1998, Plaintiff, a prisoner appearing *pro se*, was granted leave to proceed *in forma pauperis* in this civil rights action. Pursuant to 28 U.S.C. §1915(b)(1), the Court directed Plaintiff to pay an initial partial filing fee of $9.67 by December 5, 1998. Moreover, the Court advised Plaintiff that he may voluntarily dismiss this action in accordance with Fed. R. Civ. P. 41(a) by the date specified above without incurring any fees or costs.

On November 5, 1998, Plaintiff filed a "motion to withdraw" (docket #7), requesting "to allow withdrawl [sic] from above complaint number" and "to know deadline to refile the above mentioned complaint." The Court must construe pleadings submitted by *pro se* litigants liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972); Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Pursuant to Haines, the Court liberally construes Plaintiff's request as a motion to dismiss the complaint and finds that Plaintiff's motion should be granted.

As to the deadline for "refiling" this action, because there is no federal statute of limitations for a civil rights action, the time in which such action must be filed is determined by the applicable

state statute of limitations for personal injury actions. Wilson v. Garcia, 471 U.S. 261, 266-67 (1985). The applicable statute of limitations under Oklahoma law is the two-year limitations period for "an action for injury to the rights of another." Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988). In such cases the cause of action accrues at the time the complained of injury occurred. Id. Thus, a plaintiff must bring an action within two years of the date of that occurrence.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion to dismiss the complaint (#7) is **granted** and this action is **dismissed without prejudice**.

IT IS SO ORDERED.

This 18th day of November, 1998.

Sven Erik Holmes
United States District Judge

11/19/98 pe

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TOMMY LEE HART, JR.,

Plaintiff,

vs.

Case No. 97 CV 369 H (J)

P.S. JORDAN, BADGE NO. 1596 S. MOORE, CHIEF OF POLICE RON PALMER, AND THE CITY OF TULSA,

Defendants.

ENTERED ON DOCKET

DATE NOV 20 1998

ORDER

Before this Court is the Motion for Summary Judgment filed by Defendants P.S. Jordan, S. Moore, Chief of Police Ron Palmer and the City of Tulsa. This motion came on for hearing on November 6, 1998, at which time the Court heard argument on the motion.

With respect to the City of Tulsa, it is settled law under *Monnell v. New York City Department of Social Services*, 436 U.S. 658, 691-692 (1978), that a plaintiff seeking to impose liability on a municipality under §1983 must identify an official "policy" or "custom" of the municipality which caused the constitutional violation. The record reflects nothing whatsoever that would constitute a policy or custom as those terms are understood under applicable law. Accordingly, summary judgment in favor of the City of Tulsa will be granted.

With respect to the claims of qualified immunity by Defendants P.S. Jordan, S. Moore, and Chief of Police Ron Palmer, it is settled law that qualified immunity shields police officers from liability when the officer's conduct does not violate clearly established constitutional rights of which a reasonable person would have known. That standard in the instant case is argued to have been violated, not by virtue of any overt violation in the

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actions of the police, but rather, if they had done a more effective or less sloppy job in investigating the crime, they would have learned that there was sufficient exculpatory evidence to otherwise eliminate what is concededly on its face probable cause. The law does not require or does not determine that such failure to fully investigate on the scene, when in fact there exists probable cause to effect the arrest, amounts to a constitutional violation. Therefore, the Court finds there was no such constitutional violation arising out of a lack of fully appreciating allegedly exculpatory evidence on the scene. Since there is not a clear violation of a constitutional right, the Court finds that qualified immunity applies, and therefore the motion for summary judgment as to the individual officers for qualified immunity is hereby granted.

Based on those rulings the Defendants motion for summary judgment is hereby granted.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT R. SHAVER,

Defendant.

Case No. 98-CV-167-H(J)

JUDGMENT

This matter came before the Court on a Motion for Summary Judgment by Plaintiff. The Court duly considered the issues and rendered a decision in accordance with the order dated November 2, 1998.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Plaintiff and against Defendant in the principal amounts of $2,930.89 and $741.38, administrative charges in the amounts of $39.18 and $16.28, and accrued interest in the amounts of $1,178.19 and $291.27.

IT IS SO ORDERED.

This 18th day of November, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FREDDIE,; SCOTT,

Plaintiff,

v.

STEPHEN C. LEWIS, United States Attorney, TERESA TRISSELL, Attorney, DAVIS O'MEILIA, Attorney, HONORABLE THOMAS R. BRETT, Judge.

Defendant.

ENTERED ON DOCKET
DATE 11/20/98

No. 98-CV-698-K

FILED
1 [illegible]

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Pursuant to an Order entered October 22, 1998, Plaintiff was given until November 12, 1998 to either submit the proper filing fee of $150.00 or file a completed affidavit of financial status to proceed in forma pauperis in the above styled case. The Plaintiff has failed to comply with the Court's order and has not satisfied the requirements for filing a case with this Court.

This case is hereby ordered dismissed without prejudice.

ORDERED this 18th day of November, 1998.

Terry C. Kern

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

INTELICAD COMPUTERS, INC., an Oklahoma corporation,	)	ENTERED ON DOCKET
	)	DATE 11/20/98
Plaintiff,	)	
vs.	)	**No. 97-C-976-K**
NORTHERN INSURANCE COMPANY OF NEW YORK, a New York corporation,	)	
Defendant.	)	

FILED
1[illegible]3 SAC
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the motion of defendant Northern Insurance Company of New York ("Northern") for summary judgment. This lawsuit is a declaratory judgment action to determine whether certain insurance policies give rise to a duty to defend plaintiff InteliCAD Computers, Inc., ("InteliCAD") in a lawsuit brought by Construction Technology, Inc. ("CTI") against InteliCAD in the United States District Court for the Eastern District of New York. See Construction Technology, Inc. v. InteliCAD Computers, Inc., Civil Action No. 97-CV-4587 (E.D.N.Y.) (hereinafter referred to as the "underlying action"). The complaint in the underlying action alleges that InteliCAD, by manufacturing, selling, otherwise supplying and/or licensing computer software for designing sheet metal duct work for the heating, ventilating and air conditioning industry, infringed a patent of CTI. Upon receipt of the lawsuit, InteliCAD requested that Northern retain legal counsel to defend the claims, under the terms of an insurance policy issued by Northern to Oil Capital Sheet Metal, Inc., which named InteliCAD as an additional insured. Northern determined that the claims in the underlying action were not covered by the policy. Consequently, Northern

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declined to defend the underlying action.

The parties do not dispute, and the Court agrees, that Oklahoma law applies to the issues in this action. Certain principles are established. An insurer has a duty to defend an insured whenever it ascertains the presence of facts that give rise to the potential of liability under the policy. First Bank of Turley v. FDIC of Maryland, 928 P.2d 298, 303 (Okla.1996). The duty arises when the allegations in a complaint, and other information gained by the insurer, indicate a possibility of coverage. Id. at 303 n.14 & n.15. When defining a term found in an insurance contract, the language is given the meaning understood by a person of ordinary intelligence. Max True Plastering Co. v. U.S.F.&G. Co., 912 P.2d 861, 869 (Okla.1996)(footnote omitted). A policy term is ambiguous under the reasonable expectations doctrine if it is reasonably susceptible to more than one meaning. Id. Any doubt whether a duty to defend has arisen must be resolved in favor of the insured. Maryland Cas. Co. v. Willsey, 380 P.2d 254, 258 (Okla.1963).

The insurance policy provides coverage for "'[a]dvertising injury' caused by an offense committed in the course of advertising your goods, products or services. . . ." "Advertising injury" is further defined by the policy to include, as relevant here, "misappropriation of advertising ideas or a style of doing business" and "infringement of copyright, title or slogan." Assuming one of these predicate offenses were found to exist, then the second requirement would have to be met, namely that the injury was "caused by an offense committed in the course of advertising [InteliCAD's] goods, products, or services." If no predicate offense exists, then the inquiry ends; there can be no advertising injury and no corresponding duty to defend. See Novell, Inc. v. Federal Ins. Co., 141 F.3d 983, 988-89 (10th Cir.1998).

It is undisputed that the new advertising injury offense of "misappropriation of advertising

ideas or style of doing business" replaced the prior advertising offenses of "unfair competition" and "piracy" in standard insurance contracts like the one at issue. The Insurance Services Office, an insurance industry organization which develops standardized policy language, prepared an "Introduction and Overview" form describing this change in language as intending "no change in scope" (InteliCAD Response Brief at 8). InteliCAD therefore argues that potential coverage exists under any or all of these offenses.

Upon review, this Court joins the majority of published decisions, which favors Northern. See Everest & Jennings, Inc. v. American Motorists Ins. Co., 23 F.3d 226, 229 (9th Cir.1994) (no connection shown between patent infringement and advertising); Iolab Corp. v. Seaboard Sur. Co., 15 F.3d 1500, 1505 (9th Cir.1994) (patent infringement was not piracy related to advertising); Gencor Industries, Inc. v. Wausau Underwriters Ins. Co., 857 F.Supp. 1560, 1566 (M.D.Fla.1994) (piracy and unfair competition does not include patent infringement); Atlantic Mut. Ins. Co. v. Brotech Corp., 857 F.Supp. 423, 428-29 (E.D.Pa.1994) (same), aff'd, 60 F.3d 813 (3d Cir.1995); St. Paul Fire & Marine Ins. Co. v. Advanced International Sys., 824 F.Supp. 583, 585-87 (E.D.Va.1993) (patent infringement does not constitute misappropriation of advertising ideas or style of doing business), aff'd, 21 F.3d 424 (4th Cir.1994).

InteliCAD's attempt to distinguish this authority, by noting that the allegations in the underlying action were claims of inducement to infringe and contributory infringement, is unavailing. This Court has previously decided this very issue in the unpublished decision, InteliCAD Computers, Inc. v. Travelers Property Casualty Company, Case No. 97-CV-975-K (September 29, 1998). Addressing identical policy language, this Court ruled that the policies' definition of "advertising injury" simply cannot be read to include inducement to infringe.

Because the Court has no found nc possibility of predicate offense, InteliCAD's subsidiary argument regarding the recent amendment of the Patent Act to include "offers to sell" as a basis for direct and contributory patent infringement liability, does not direct a different result. Under this policy, there is no coverage for any type of patent infringement. Summary judgment is appropriate.

It is the Order of the Court that the motion of the defendant Northern Insurance Company of New York for summary judgment (#7) is hereby GRANTED.

ORDERED this 19 day of November, 1998.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

INTELICAD COMPUTERS, INC., an Oklahoma corporation,	)	ENTERED ON DOCKET
	)	DATE 11/20/98
Plaintiff,	)	
vs.	)	**No. 97-C-976-K**
NORTHERN INSURANCE COMPANY OF NEW YORK, a New York corporation,	)	
Defendant.	)	

FILED
NOV 19 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the Defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendant and against the Plaintiff.

ORDERED THIS DAY OF 19 NOVEMBER, 1998.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SOUTHWESTERN BELL TELEPHONE COMPANY, Plaintiff, vs. BROOKS FIBER COMMUNICATION OF OKLAHOMA, INC., et al., Defendants.	)	No. 98-C-468-K

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ORDER

Before the Court is the motion for intervention or joinder as defendant by Cox Oklahoma Telcom, Inc. ("Cox"). In this action, plaintiff seeks review of an order of the Oklahoma Corporation Commission ("OCC") enforcing certain provisions of an Interconnection Agreement between plaintiff and defendants Brooks Fiber Communications of Oklahoma, Inc. and Brooks Fiber Communications of Tulsa, Inc. Cox was permitted intervention in the OCC proceedings, as were AT&T, Sprint, MCI and other entities. Of these, only Cox has sought intervention in the case at bar.

Under Rule 24(a)(2) F.R.Cv.P., an applicant may intervene as of right only if: (1) the application is made in a timely manner; (2) the applicant claims an interest relating to the property or transaction that is the subject of the action; (3) the applicant's interest, as a practical matter, may be impaired or impeded; and (4) existing parties do not adequately represent the applicant's interests. Coalition of Ariz./N.M. Counties for Stable Econ.

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Growth v. Department of Interior, 100 F.3d 837, 840 (10th Cir.1996). No argument has been made that Cox's application is untimely. In view of the early stage in which this litigation finds itself, the Court finds the first prong satisfied.

To establish the second element, an applicant must show that its interest in the property or transaction at issue is "direct, substantial and legally protectable." Coalition, 100 F.3d at 840. The "interest" inquiry is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process" Id. at 841. Cox argues that it has a similar, but not identical, Interconnection Agreement with plaintiff, and does not wish res judicata or stare decisis to affect Cox's own rights. Cox points to ¶30 of the plaintiff's complaint, which refers to agreements with other competitors, and ¶31 of the complaint, which seeks an injunction against the OCC from applying its "erroneous interpretation" of the Southwestern Bell-Brooks Agreement to "other parties".

Plaintiff responds that the Agreement it has with Cox is "not relevant" to the issues in this case. Further, that the injunction issue is a "red herring" because plaintiff merely seeks to insure that the OCC abides by the principle that a "reversed" decision is no longer precedent.[1] Plaintiff cannot have it both ways. If its agreement with Brooks is legally unique, plaintiff cannot seek an injunction which might be interpreted as prohibiting the OCC from

[1]This Court is essentially placed in the position of an appellate court by the jurisdictional statute, 47 U.S.C. §252(e)(6).

reviewing all relevant factors in interpreting another party's agreement. It is highly unlikely that this Court would issue any sort of injunction against the OCC, and one affecting parties not before the Court would be of questionable validity. However, for purposes of the present motion, the Court finds the second prong is also satisfied.

The third prong of the intervention test requires the applicant to establish that the disposition of the lawsuit "may as a practical matter impair or impede [its] ability to protect [its] interest." Coalition, 100 F.3d at 844. Stare decisis is sufficient impairment. Id. Plaintiff and Cox basically advance the same arguments in this regard as they did regarding the second prong, and the Court renders the same decision for the reasons stated.

The final element that an intervenor applicant must demonstrate is that existing parties do not represent its interests adequately. The applicant's burden on this point is "minimal". Coalition, 100 F.3d at 844. However, representation is presumed to be adequate "when the objective of the applicant for intervention is identical to that of one of the parties." City of Stilwell v. Ozarks Rural Elec. Coop. Corp., 79 F.3d 1038, 1042 (10th Cir.1996). Movant sets forth the following arguments why Brooks cannot adequately represent Cox's interests: (1) the Brooks/SWBT Agreement and the Cox/SWBT Agreement are not identical; (2) since Brooks and Cox are direct competitors, reliance upon Brooks to represent the interests of Cox could create a conflict of interest; (3) to the

extent the intent of the contracting parties or circumstances of negotiation become relevant, Brooks is completely unable to represent Cox's interests.

The Court is not persuaded by Cox's arguments. As to (1) and (3), the Court emphasizes that this case deals solely with the Brooks Agreement. Even if Cox's motion were granted, Cox would be limited to arguments common to its Agreement and the Brooks Agreement. Differences, whether in language or the parties' intent, are irrelevant in this proceeding. This Court's ruling will not in any way be binding on Cox as to factual or other matters which distinguish its Agreement from the one before this Court. As to argument (2), while Cox and Brooks are competitors, it strains credulity that Brooks would intentionally present weak arguments for the purpose of damaging Cox's interests. Both Cox and Brooks have the identical objective, which is the upholding of the OCC decision. Therefore, absent "a concrete showing of circumstances. . . that make [the existing party's] representation inadequate", intervention should be denied. Bottoms v. Dresser Indus., Inc., 797 F.2d 869, 872 (10th Cir.1986).[2] Intervention as of right is denied.

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[2]The OCC decision reflects the following argument made by Cox: "Cox noted that while it agrees with Brooks' position on appeal, certain differences exist between its interconnection agreement with SWBT compared with Brooks' agreement with SWBT. Cox believes those differences provide additional grounds for [ruling in its favor] under its interconnection agreement with SWBT, irrespective of the Commission's decision regarding the Brooks-SWBT agreement" (Exhibit to Complaint at 4)(emphasis added). Again, Cox would be precluded from raising these "certain differences" in this litigation. On the common arguments, Brooks is an adequate representative.

In the alternative, Cox seeks permissive intervention under Rule 24(b)(2) F.R.Cv.P. Under that Rule, "anyone may be permitted to intervene. . . when an applicant's claim or defense and the main action have a question of law or fact in common." The decision is a matter within the district court's discretion. City of Stilwell, 79 F.3d at 1043. Upon the issues in this case properly narrowed, the Court finds it agrees with plaintiff that "Cox can be expected to be no more than another voice espousing the same views that Brooks will voice on all the issues actually joined by the complaint and the answer. . . Thus, its presence will complicate, not expedite, the orderly disposition of the issues joined by the pleadings." (Plaintiff's response at 4).

This is a "paper" case, with no discovery contemplated. Plaintiff, Brooks and the OCC are all represented by highly competent counsel (as is Cox). The parties presently before the Court will brief the issues, and the Court will conduct its own independent research. While an additional brief by an intervenor, and plaintiff's response thereto, are not insuperable complications, the Court is not persuaded that the issues raised are so murky and uncharted that such briefing would be helpful. The parties anticipate that this case will be determined by cross-motions for summary judgment. Cox is, of course, free to continue monitoring this litigation. Upon review of the parties' briefs, if Cox is convinced that an issue, relevant to this litigation, has not been properly addressed, Cox may file a motion for leave to file an amicus brief. As matters stand, Cox's primary concern

appears to be the presentation of other issues pertinent to its Agreement, which is not before this Court and was not before the OCC. As the saying goes, the Court shall "chop the wood before it", and leave extraneous issues to another day. For the reasons stated, Cox has also not shown an adequate basis to be joined as a defendant in this action, and this alternate aspect of the motion will be denied as well.

It is the Order of the Court that the motion of Cox Oklahoma Telcom, Inc. for intervention or joinder as defendant (#6) is hereby DENIED.

ORDERED this 18 day of November, 1998.

Terry C Kern

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 11/19/98

CHARLES L. GADDY,

Plaintiff,

vs.

No. 98-C-273-K

ONEOK INC., d/b/a OKLAHOMA NATURAL GAS COMPANY, et al.

Defendants.

FILED

NOV 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

O R D E R

Before the Court is the motion of the defendants to strike plaintiff's jury demand and for partial dismissal of plaintiff's claims. Plaintiff brings this action under the Employment Retirement Income Security Act ("ERISA"), arising out of his discharge and the denial to him of benefits. Defendants assert (1) plaintiff is not entitled to jury trial in an ERISA action; (2) plaintiff may not seek "extra-contractual" damages under ERISA; and (3) only the employee benefit plan, not the employer, may be liable in an action seeking benefits.

Plaintiff concedes that he has no right to jury trial, as he must under the recent decision in Adams v. Cyprus Amax Minerals Co., 149 F.3d 1156 (10th Cir.1998). This aspect of defendants' motion is granted.

Defendants are also correct that extra-contractual relief is unavailable. Lafoy v. HMO Colorado, 988 F.2d 97, 99-101 (10th Cir.1993). Plaintiff states that "Mr. Gaddy has not sought extra-contractual damages" in this lawsuit. (Plaintiff's response at 6).

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In view of this statement by plaintiff, as defendants concede, the issue is moot. To the extent any portions of the complaint could be read as seeking such damages, the plaintiff is now on notice that his recovery is limited by statute to lost benefits.[1]

Finally, defendants attack plaintiff's cause of action for breach of fiduciary duty. Defendants correctly note that 29 U.S.C. §1132(a)(2), cited in the complaint, does not provide such a cause of action to a plan participant. Walter v. International Ass'n of Machinists Pension Fund, 949 F.2d 310, 317 (10th Cir.1991). However, defendants also concede that in Varity Corp. v. Howe, 116 S.Ct. 1065 (1996) the United States Supreme Court held that such an action was permissible under 29 U.S.C. §1132(a)(3), a provision cited elsewhere in the complaint. Defendants argue for a narrow interpretation of Varity and assert that the plaintiff's claim for relief is already encompassed in other causes of action. The Court is not prepared to make such a ruling in the context of a motion to dismiss. Discovery will be allowed to proceed, and the Court will revisit the issue during the bench trial. Similarly, the Court will not definitively rule on defendants' argument that, while Oneok, Inc. may be a proper party if sued in its official capacity, it cannot be held liable for any plan benefits. Since Oneok will remain as a party defendant in any event, this determination may also await final entry of judgment.

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[1]Plaintiff is apparently pursuing a wrongful termination claim in state court, where presumably the traditional range of damages is available.

It is the Order of the Court that the motion of the defendants to strike plaintiff's jury demand and for partial dismissal (#2) is hereby GRANTED to the extent that plaintiff's demand for jury trial is hereby stricken and any claim of plaintiff for extra-contractual damages is dismissed. In all other respects, the motion is DENIED.

ORDERED this 18 day of November, 1998.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

COLLEEN WHITEHEAD, et al.,

Plaintiffs,

vs.

OKLAHOMA GAS & ELECTRIC COMPANY, an Oklahoma Corporation; OKLAHOMA GAS AND ELECTRIC RETIREMENT PLAN, a qualified retirement plan trust; and H. L. GROVER, IRMA ELLIOT, and ROB SCHMID, in their capacities as members of the Oklahoma Gas and Electric Retirement Plan Committee,

Defendants.

ENTERED ON DOCKET

DATE NOV 19 1998

Case No.94-CV-682-H

FILED

NOV 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION

Defendants' MOTION FOR ATTORNEYS' FEES [Dkt. 138], and MOTION FOR LEAVE TO SUPPLEMENT THEIR MOTION FOR ATTORNEYS' FEES [Dkt. 152] are before the undersigned United States Magistrate Judge for report and recommendation.

Defendants were completely successful in their defense of this litigation and now seek an assessment of attorney's fees against the individual Plaintiffs pursuant to 29 U.S.C. § 1132(g)(1). The granting of attorneys fees to the prevailing party under 28 U.S.C. § 1132 (g)(1) is a matter of the trial court's discretion. In exercising this discretion, the court should consider the following factors, among others: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to personally satisfy an award of attorney's fees; (3) whether an award of attorney's fees against the opposing parties would deter others from acting under

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similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions. *Downie v. Independent Drivers Association Pension Plan*, 945 F.2d 1171, 1172 (10th Cir. 1991); *Gordon v. United States Steel Corporation*, 724 F.2nd 106, 109 (10th Cir. 1983); *Eaves v. Penn*, 587 F.2d 453, 465 (10th Cir. 1978).

In applying these factors, the courts have not distinguished between the party's conduct and the attorney's conduct in the management of the litigation.[1] This Court is persuaded that in analyzing the assessment of fees under 29 U.S.C. § 1132(g)(1) it is appropriate to make such a distinction. By making this distinction, Plaintiffs will be held financially responsible for their own conduct, or conduct fairly attributable to them, but not for the manner in which the litigation was conducted which was controlled by counsel. Further, an attorney's conduct may subject them personally to an award of fees under 28 U.S.C. § 1927. Consequently, there is no need to assess fees against a Plaintiff to account for the manner in which his attorney conducted the litigation. Therefore, in deciding Defendants' motion under § 1132(g)(1), the Court has considered the above factors only in relation to Plaintiffs' conduct or that conduct which is fairly attributable to them.[2]

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[1] In both *Monkelis v. Mobay Chemical*, 827 F.2d 935 (3rd Cir. 1987) and *Vintilla v. United States Steel Corp. Plan*, 642 F.Supp. 295 (W.Dist. Pa. 1986) the courts considered the manner in which the litigation was conducted. However, this distinction was not addressed.

[2] In making this distinction, the Court is not precluded from considering the manner in which the litigation was conducted should the party seeking the fees demonstrate that such conduct was fairly attributable to the opposing party personally. In this case there has been no such showing.

Degree of the opposing parties' culpability or bad faith:

There is no evidence before the court that the individual Plaintiff's acted culpably or in bad faith either in their conduct with Defendants prior to the initiation of this litigation or in the litigation itself. The three Plaintiffs were each long-term employees of Oklahoma Gas & Electric Company who were seeking retirement credit for years they worked for Oklahoma Gas & Electric Company prior to a break in service. Two of the three Plaintiffs had breaks in service for reasons which complicated the analysis of their legal positions (forced break in service due to pregnancy and break in service due to military service) and Plaintiffs had only a short period of time to consider their retirement options prior to beginning litigation. Given this situation, the Court finds that the Plaintiffs were not culpable or acting in bad faith in their dealings with Oklahoma Gas & Electric Company or in initiating this litigation.

Ability of the opposing parties to personally satisfy an award of attorney's fees:

There is no substantial evidence in the record regarding this factor. Plaintiff's financial affidavits are insufficient for any meaningful analysis of their financial condition and Defendants have offered no evidence concerning this factor.

Whether an award of attorney's fees against the opposing party would deter others from acting under similar circumstances:

Defendants have focused their argument on the manner in which the litigation was conducted without producing any evidence that the alleged improper conduct is fairly attributable to the Plaintiffs personally.

Whether the parties requesting fees sought to benefit all participants and beneficiaries

of an ERISA plan or resolve a significant legal question regarding ERISA:

By preserving funds for those claims properly covered under the retirement plan, Defendants sought to benefit all participants and beneficiaries under the plan.

Relative merits of the parties' positions:

While this factor weighs, as it usually will, on the side of the prevailing party, the Court does not view this case as completely lacking in merit or as being pursued for some improper purpose. The cases cited by Defendants: *Monkelis v. Mobay Chemical*, 827 F.2d 935 (3rd Cir. 1987) and *Vintilla v. United States Steel Corp. Plan*, 642 F.Supp. 295 (W.Dist. Pa. 1986) are clearly distinguishable. In both cases, the trial courts took a very dim view of the litigation. Without commenting on the manner in which this litigation was conducted, this Court does not share a similar view of this litigation.

Conclusion:

Based on the foregoing analysis of the *Eaves* factors, the undersigned United States Magistrate Judge RECOMMENDS that Defendants' MOTION FOR ATTORNEYS' FEES [Dkt. 138] be DENIED. This recommendation makes Defendants' MOTION FOR LEAVE TO SUPPLEMENT THEIR MOTION FOR ATTORNEYS' FEES [Dkt. 152] MOOT.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and

recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 17th Day of Nov., 1998.

Frank H. McCarthy

FRANK H. MCCARTHY
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 19th Day of November, 1998.

L Talley

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

THE UNKNOWN HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS OF GLENN T. MATTOX aka Glenn Thompson Mattox, Deceased; JOHN H. MATTOX; SARAH CHAPPEL; STATE OF OKLAHOMA ex rel. Oklahoma Tax Commission; COUNTY TREASURER, Washington County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Washington County, Oklahoma,

Defendants

CIVIL ACTION NO. 96-CV-1150-K

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 18th day of November, 1998, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on September 15, 1998, pursuant to an Order of Sale dated May 19, 1998, of the following described property located in Washington County, Oklahoma:

> The East 119.4 feet of Lot Six (6) and the East 104.6 feet of Lot Seven (7) and the West 14.8 feet of the East 119.4 feet of the North 38.5 feet of Lot Seven (7), Block Six (6), Oak Ridge Heights, Bartlesville, Washington County, Oklahoma.

Appearing for the United States of America is Peter Bernhardt, Assistant United States Attorney. Notice was given the Defendants, The Unknown Heirs, Executors,

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Administrators, Devisees, Trustees, Successors and Assigns of Glenn T. Mattox aka Glenn Thompson Mattox, Deceased, by publication; Defendants, John H. Mattox; Sarah Chappel; State of Oklahoma ex rel. Oklahoma Tax Commission through Kim D. Ashley, Assistant General Counsel; County Treasurer, Washington County, Oklahoma and Board of County Commissioners, Washington County, Oklahoma, through Thomas Janer, Assistant District Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Examiner-Enterprise, a newspaper published and of general circulation in Washington County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Veterans Affairs, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Veterans Affairs, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
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333 West 4th Street, Suite 3460
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(918) 581-7463

Report and Recommendation of United States Magistrate Judge
Case No. 96-CV-1150-K (Mattox)

PB:css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MCDONNELL DOUGLAS CORPORATION,

Plaintiff,

vs.

CHESTER ENGINEERS, INC. and
U.S. POLLUTION CONTROL, INC.,

Defendants.

No. 97-C-339-B

ORDER

Before the Court are the Motions for Summary Judgment filed by defendant Chester Engineers, Inc. (Docket No. 31) and U.S. Pollution Control, Inc. (Docket No. 30) and the Motion for Partial Summary Judgment filed by plaintiff McDonnell Douglas Corporation (Docket No. 34). Plaintiff McDonnell Douglas Corporation ("MCD") filed this action on April 14, 1997, stating claims of negligence, contractual indemnification and declaratory judgment against defendants Chester Engineers, Inc. ("Chester") and U.S. Pollution Control, Inc. ("USPCI") based on defendants' alleged defective performance in the closure of two surface impoundments in 1989. Chester and USPCI seek summary judgment on all claims; MCD seeks summary judgment on defendants' liability as to the contractual indemnification claim. For the reasons set forth below, the Court denies MCD's motion for partial summary judgment and grants defendants' motions for summary judgment in part and denies it in part.

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I. Summary of Undisputed Facts

The U.S. Air Force owns the facility known as at Air Force Plant No. 3 on North Memorial in Tulsa, Oklahoma. MCD had leased and operated portions of Air Force No. 3. Two surface impoundments at Air Force No. 3 had served as an industrial waste treatment plant from 1952 to 1988. The impoundments were unlined and primarily contained F019 waste (chromium wastewater treatment sludge). After November 8, 1988, hazardous wastes could no longer legally be stored in unlined impoundments. Having determined that placing a liner underneath the existing impoundments was not feasible, MCD elected to close the impoundments in place. The applicable provision under the Code of Federal Regulations, 40 C.F.R. §265.228(a)(2), for closure-in-place of the site required the MCD to

> (i) Eliminate free liquids by removing liquid wastes or solidifying the remaining wastes and waste residues;
> (ii) Stabilize remaining wastes to a bearing capacity sufficient to support the final cover; and
> (iii) Cover the surface impoundment with a final cover . . . .

On November 3, 1987, MCD entered into a contact with Chester, Subcontract No. LSS-1738 ("Chester Contract"), whereby Chester agreed to "provide all Professional Engineering Services" for the closure of the two hazardous waste surface impoundments. *Chester Contract, p.1.* As part of those services, Chester was to design and implement a Closure Plan, including technical specifications, which accorded with applicable federal environmental regulations. *Chester Contract, Exs. A and B.* In addition, Chester agreed to "[p]rovide an on-site Resident Engineer . . . during the entire implementation of the Closure proceedings" and "on a daily basis . . . [m]aintain surveillance of the Closure activities to assure Closure is being conducted in accordance with the Closure Plan submitted to and approved by the Oklahoma State Health

Department," and "the construction activities are performed in compliance with all pertinent RCRA regulations and McDonnell Douglas construction methods." *Chester Contract, Ex. B. at p. II-7.*

> The Closure Plan developed by Chester provides in pertinent part the following:
>
> The closure plan details a closure-in-place method. There will be no sludge removed to off-site facilities. All sludge will be physically stabilized using fly ash as determined by the closure design and left in place. The stabilization technique will be designed to promote the structural integrity and bearing capacity of the sludge/stabilization material mixture to ensure the integrity of the cap.

Closure Plan, p. I-21. The technical specifications for the closure describe how the impoundment sludge will be physically stabilized:

> 2SP2.1.1 The impoundment sludge shall be physically stabilized in place by the Contractor.
> 2SP2.1.2 Contractor shall detail, in his return bid, proposed methods of mixing (ex.: mix with track hoe pneumatic blenders). The sludge (Drawing No. 3716-3 of the design plans indicate variable and approximate sludge depths) shall be stabilized using Muskogee, Oklahoma ASTM Class C flyash in a concentration of approximately 660 lb. per cubic yard of original sludge.
> 2SP2.1.3 The existing sludge volume is approximately 43,000 cubic yards.
> 2SP2.1.4 Testing shall be conducted by the Chester Engineers to assure that a strength of at least 3,000 pounds per square foot unconfined compressive strength is being achieved.

Technical Specifications, p. 2SP2.1. Later, MCD agreed to a reduction in the compressive strength from 3000 pounds per square foot to 1400 pounds per square foot. The Closure Plan agreed to by the parties, therefore, was to leave the hazardous material in place, stabilize the sludge with flyash and cover the solidified material with an earthen and geo-textile cap. The enclosed impoundment would then be subject to environmental monitoring as it had been for the preceding forty years.

To perform the closure, MCD contracted with USPCI, Subcontract No. LSS-1873 ("USPCI Contract"), on July 11, 1988, pursuant to which USPCI agreed to "perform all operations necessary to perform the closure of two (2) sludge lagoons (surface impoundments) by stabilizing sludge with flyash, covering the impoundments with clay caps, grading and planting with grass to complete the work for [the] Project . . ." *USPCI Contract, p. 1.* The USPCI Contract also provided that USPCI's "work shall be performed in accordance with the Terms and Conditions of this contract and the following attached EXHIBITS," which included Chester's Closure Procedure and Technical Specifications. *USPCI Contract, pp. 1-2, Exhibits K and G.*

Both the Chester and USPCI Contracts contained the following provisions:

> 4. WARRANTY
> (A) Seller warrants that all goods and services furnished hereunder will conform to the requirements of this contract (including all descriptions, specifications and drawings made a part of this contract) and such goods will be merchantable, fit for their intended purposes, free from all defects in materials and workmanship and, to the extent not manufactured pursuant to detailed designs furnished by MDC, free from defects of design. MDC's approval of designs or specifications furnished by Seller shall not relieve Seller of its obligations under this warranty.
> (B) In addition to its other remedies, MDC may, at Seller's expense, require prompt correction or replacement of any goods and services failing to meet Seller's warranties herein. Goods and services corrected or replaced by Seller shall be subject to all of the provisions of this contract in the manner and to the extent as goods and services originally furnished hereunder.

Chester and USPCI Contracts, General Terms and Conditions, ¶4.

> 6. INDEMNIFICATION. Seller hereby agrees to indemnify and save harmless MDC, its agents and employees, against all liability, obligations, claims, loss and expense (a) caused or created by SELLER, its subcontractors, or the agents and employees of either, whether negligent or not, arising directly or indirectly out of the WORK or (b) arising directly or indirectly out of injuries suffered or allegedly suffered by employees of SELLER or its subcontractors (i) in the course of their employment, (ii) in the performance of the WORK hereunder, and (iii) upon premises owned and controlled by MDC, and shall give MDC written notice of any death or injuries suffered or allegedly suffered by employees of SELLER or

its subcontractors promptly after any such incidents. Further, SELLER shall indemnify and save harmless MDC, the Government and the owner of any real property upon which the WORK is to be performed against any liability to subcontractors or other third persons under the mechanics, materialmen, labor or other applicable lien laws of the state in which the WORK is to be performed.

Chester and USPCI Contracts, Special Terms and Conditions, ¶6.

9. MATERIALS AND WORKMANSHIP.
Except as otherwise specified in this Subcontract, SELLER shall provide and pay for all materials, labor, tools, equipment, appliances and other items necessary to complete performance. Materials shall be new and of good quality and in accordance with the specifications of this Subcontract. Performance shall be executed in a good and workmanlike manner by qualified workmen skilled in their respective trades. Upon request by MDC, SELLER shall submit sample materials and performance shall be in accordance with such approved samples.

Chester and USPCI Contracts, Special Terms and Conditions, ¶9.

23. WARRANTY.

SELLER warrants that the work will be performed to the best of his ability and in accordance with the highest standards in the field.

Chester and USPCI Contracts, Special Terms and Conditions, ¶23.

The USPCI Contract also included the following additional warranty and indemnification provisions under its General Provisions for Construction Contracts:

¶46. WARRANTY OF CONSTRUCTION (1974 APR)
(a) In addition to any other warranties set out elsewhere in this contract, the Contractor warrants that work performed under this contract conforms to the contract requirements and is free of any defect of equipment, material or design furnished, or workmanship performed by the Contractor or any of his subcontractors or suppliers at any tier. Such warranty shall continue for a period of one year from the date of final acceptance of the work, but with respect to any part of the work which the Company takes possession of prior to final acceptance, such warranty shall continue for a period of one year from the date the Company takes possession. Under this warranty, the Contractor shall remedy at his own expense any such failure to conform or any such defect. In addition, the Contractor shall remedy at his own expense any damage to Company owned or controlled real or personal property, when that damage is the result of the

Contractor's failure to conform to contract requirements or any such defect of equipment, material, workmanship, or design. The Contractor shall also restore any work repaired or replaced hereunder [sic] will run for one year from the date of such repair or replacement.

¶17 INDEMNIFICATION
Contractor hereby agrees to indemnify and save harmless the Company, its agents and employees, against all liability, obligations, claims, loss and expense (a) caused or created by Contractor, its subcontractors, or the agents and employees of either, whether negligent or not, arising directly or indirectly out of the work or (b) arising directly or indirectly out of injuries suffered or allegedly suffered by employees of Contractor or its subcontractors (i) in the course of their employment, (ii) in the performance of the work hereunder, and (iii) upon premises owned and controlled by the Company , and shall give the Company written notice of any death or injuries suffered or allegedly suffered by employees of the Contractor or its subcontractors promptly after any such incidents. Further, the Contractor shall indemnify and save harmless the Company, the Government and the owner of any real property upon which the work is to be performed against any liability to subcontractors or other third persons under the mechanics, materialmen, labor or other applicable lien laws of the state in which the work is to be performed.

USPCI Contract, Ex. B., General Provisions for Construction Contracts, ¶¶17, 46

The USPCI work was completed by the winter of 1989, and by May 1, 1989 Chester and MCD each certified to the Oklahoma Department of Environmental Quality ("ODEQ") that closure had been performed in accordance with the Facility Closure Plan. *Professional Engineer Certification of Closure, Owner Certification of Closure.*

The resulting impoundment is being monitored and maintained under Post-Closure Care Permit No. 9570000001-PC, issued by the ODEQ to MCD and the Air Force pursuant to the state's delegation of authority under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§6901-6992k. *Complaint, ¶17.*

Sometime in 1995, MCD and the Air Force undertook a study of the site to attempt to have the landfill delisted by regulators so that the closed impoundments would no longer be subject to regulation and groundwater monitoring as a closed hazardous waste landfill.

Complaint, ¶¶18-20; USPCI Ex. 6, Response No. 21. "Delisting" requires rendering the landfill nonhazardous within the meaning of applicable environmental regulations.

In October 1995, in its effort to delist the impoundment, MCD hired A&M Engineering and Environmental Services, Inc. ("A&M") to collect appropriate core samples to evaluate the contents of the impoundment beneath the intact cap. As a result of its testing, A&M determined that hazardous waste sludge, unmixed with flyash, remained in the northwest quadrant of the impoundment and concluded that "[h]azardous materials are at the base of the landfill and present a risk for groundwater contamination." *Plaintiff's Ex. 11.* However, MCD admits "there is no groundwater contamination associated with the lagoon/landfill site." *Plaintiff's Ex. 12, ¶8.* MCD also admits that no outside agency- state or federal, review group, or statute is currently requiring them to proceed with delisting the hazardous waste.

After filing this action, MCD filed a Petition with the Environmental Protection Agency ("EPA") on November 6, 1997 to delist wastes stored in the impoundments because MCD does not believe the "petitioned wastes meet the criteria for which they were listed." *EPA's Proposed Rule, Ex. to MCD's Amended Supplemental Brief; Plaintiff's Ex. 12.* MCD proposed "stabilization" of the waste and transporting it offsite for disposal in a landfill. *Id.* MCD identified 5000 cubic yards of the 85,000 cubic yards of petitioned waste that "was not stabilized during the closure process," which "will need to be stabilized before being transported offsite for disposal." *Id.*

On or about July 14, 1998, the EPA published its proposed acceptance of MCD's request to delist the property. *Ex. to MCD's Amended Supplemental Brief.* Based on the testing results provided by MCD and pursuant to MCD's proposal, the EPA published its proposed rule to

delist the waste, permit MCD to transport the waste offsite and "clean close" the impoundment under ODEQ authority, contingent upon MCD "stabilizing" the 5000 cubic yards of waste "not stabilized during the closure process . . . before being transported offsite for disposal in a Subtitle D. landfill." *Id.*

MCD filed this action against Chester and USPCI for the cost to investigate and restabilize the unmixed sludge identified by A&M and reported to the EPA in MCD's Delisting Petition, consisting of 5000 cubic yards of waste in the northwest quadrant of the impoundment. MCD claims defendants are liable for the costs incurred and to be incurred in the stabilization of this waste based on the indemnification clauses in the Chester and USPCI Contracts and based on defendants' negligence in the closure of the impoundment in 1989.

Summary Judgment Standard

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342, 345 (10th Cir. 1986). In *Celotex,* the Supreme Court stated:

> [t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts sufficient to raise a "genuine issue of material

fact." *Anderson*, 477 U.S. at 247-48.

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 250. In its review, the Court must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

Legal Analysis

Defendants Chester and USPCI move for summary judgment on the following grounds: (1) MCD's contract claim is barred by the five-year statute of limitation for actions brought in contract; (2) MCD cannot state a claim in tort as the gravamen of its claim is in contract; and (3) any tort claim is barred under the "economic loss" doctrine. In response, MCD argues that (1) its contract claim is a contractual indemnity claim which is not barred by the five-year statute of limitations as the indemnity claim did not accrue until MCD suffered its initial cost for the A&M investigation and study in October 1995; (2) MCD can state a claim in contract and tort; and (3) Oklahoma law does not preclude MCD's negligence claim under the "economic loss" doctrine. MCD also moves for partial summary judgment on defendants' liability under MCD's contractual indemnification claim. For the following reasons the Court concludes MCD has not

established a contractual indemnity claim against defendants as the intent of the subject indemnity provisions in the Chester and USPCI Contracts is to require defendants to indemnify MCD for any "liability, obligations, claims, loss and expense" to third persons; and MCD can state a negligence claim on the facts alleged.

1. MCD's contractual indemnification claim

MCD argues the costs it has incurred and will incur from investigating and "remediating" the 5000 cubic yards of identified unmixed sludge are "caused or created" by the defendants and "aros[e] directly or indirectly out of the WORK." *Chester and USPCI Contracts, Special Terms and Conditions ¶6; USPCI Contract, General Provisions for Constructions Contracts ¶17.* Thus, by the plain language of the indemnification provisions, MCD is entitled to recover such costs from defendants. Further, MCD asserts its contractual indemnification claim is not barred by the five-year statute of limitations, as an indemnification claim does not accrue until the loss is actually incurred and paid, citing 15 O.S. §427.

In interpreting the indemnification provisions set forth in ¶6 of the Special Terms and Conditions in the Chester and USPCI Contracts and ¶17 of the General Provisions for Construction Contracts in the USPCI Contract, the Court must "attempt to ascertain the intention of the parties, based upon the whole contract, and give effect to that intent if it can be done consistent with legal principles." *Wallace v. Sherwood Const. Co., Inc.*, 877 P.2d 632, 634 (Okla. Ct. App. 1994). One of the legal principles which informs the Court's interpretation of the indemnification provisions is that an indemnity contract differs from a guaranty (or warranty) in that it is entered into to "make good and save another from loss upon some obligation which he has incurred or is about to incur to a third person,"*Oppenheim v. Nat'l Surety Co.*, 231 P.

1076, 1077 (Okla. 1925)(emphasis added). It is undisputed there is no third-party claim on MCD to bear the costs it has incurred and will incur in "delisting" the site. MCD voluntarily has incurred and will continue to incur these costs as a result of its decision to petition for delisting the wastes stored at the impoundment. Neither the EPA nor the ODEQ has required MCD to "delist" or "clean close" the site.

The Court finds that when the subject indemnification provisions are read in light of other provisions in the Chester and USPCI Contracts, the intent of the parties to restrict indemnification to MCD for liability arising from its obligation to third parties is apparent.[1] To read these provisions as MCD suggests would in effect transform the indemnification provisions into warranty provisions. Such could not reasonably have been the intent of the parties given the inclusion of general warranty provisions in ¶4 of the General Terms and Conditions and ¶9 of the Special Terms and Conditions in both the Chester and USPCI Contracts, as well as the specific warranty in ¶46 of the General Provisions for Construction Contracts in the USPCI Contract.

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[1]MCD argues the Tenth Circuit reviewed the identical indemnification provisions in *United States v. Hardage*, 985 F.2d 1427 (10th Cir. 1993), and concluded that MCD was entitled to indemnification from USPCI as a matter of law "because the applicable indemnification provision was 'all inclusive and unambiguous' and sufficient to exculpate McDonnell Douglas." *MCD's Motion for Partial Summary Judgment and Response, pp. 11-13.* MCD misapprehends the *Hardage* case.

First, unlike this case, *Hardage* involves a "third-party" claim or obligation as both MCD and USPCI were statutorily liable as generator and transporter, respectively, for a hazardous waste cleanup under CERCLA. Second, contrary to MCD's representation, the language of the indemnification provision the Tenth Circuit found "all inclusive and unambiguous" and sufficient to exculpate MCD in *Hardage* differed from that of the subject indemnification provisions in that USPCI agreed to indemnify MDC for all losses "resulting from" USPCI's transportation or disposal of materials. The circuit court concluded: "our analysis of Oklahoma law leads us to conclude that the term "resulting from" is the type of all-inclusive and unambiguous language sufficient to exculpate MDC for its strict generator liability." *Id.* at 1435. In so finding, however, the circuit court distinguished the more limiting language of the indemnification provision which ran in favor of USPCI which, like USPCI's and Chester Engineer's in this case, covered losses "caused or created by" the indemnitor, concluding this provision excluded liability arising from the indemnitee's status or actions. *Id.* The court found "that USPCI, which caused its own liability by selecting and transporting waste . . . may not claim indemnification under Attachment B." *Id.* (emphasis added)

Further, to adopt MCD's two-party indemnification argument would enable MCD to unilaterally extend defendants' liability under the subject contracts past the five-year Oklahoma statute of limitations for written contracts, a result neither intended by the contracts or by law. The rationale for the accrual of an indemnification claim commencing when a loss is incurred and paid is that no claim or obligation otherwise exists until such time. The parties' obligations under a contract, however, arise upon the execution of the contract, or in the case of construction contracts, at the completion of the performance under the contract. It is contrary to Oklahoma law to allow MCD to sit on its rights under the contract until it decides to inquire into whether there has been a breach, incur costs to remedy the alleged breach, and then make claim against defendants after the statute of limitations for an action on the contract has run. If the subject provisions were intended to be two-party indemnification provisions, the statute of limitations should accrue when all other actions on the contract between the parties, including claims for breach of warranty, should accrue - at the completion of the construction.

The Court thus concludes the subject provisions were intended to "indemnify and save harmless" MCD from a loss upon an obligation which MCD has incurred or will incur to a third party, and not, as MCD urges, to cover costs MCD voluntarily incurred in deciding to convert the site from a closed hazardous waste landfill to a "clean" landfill by moving the waste offsite for storage. Any contract claim MCD can state under the Chester and USPCI Contracts for their alleged failure to effect a proper closure of the site is one for breach of contract, which MCD concedes is barred by the five-year statute of limitations under 12 O.S. §95(1). Accordingly, the Court grants defendants' motions for summary judgment and denies MCD's motion for partial summary judgment on MCD's contractual "indemnification" claim.

2. MCD's negligence claim

MCD also alleges USPCI was negligent in performing the closure of the impoundment as it failed to mix all the waste sludge with flyash in sections of the northwest quadrant and Chester was negligent in its oversight of the work performed by USPCI. Defendants contend MCD cannot state a negligence claim against them because the gravamen of MCD's claim lies in contract, not tort, and the economic loss doctrine bars any tort claim. The Court disagrees.

Oklahoma law does not draw the kind of bright-line distinction between contract and tort claims defendants apparently discern in this case. Indeed, although the Oklahoma Supreme Court has distinguished tort and contract characteristics based upon an analysis of the standard of care allegedly breached and damages sought in a case, the distinctions are ultimately not preclusive of any remedy.

For example, in *Flint Ridge Development Co., Inc. v. Benham-Blair and Affiliates, Inc.*, 775 P.2d 797 (Okla. 1989), a development company sued an architectural and engineering firm alleging that due to the firm's "faulty performance under the contract the completed projects are not what [the company] bargained for." *Id.* at 800. The defendant had been hired to furnish architectural, engineering and construction supervision in the development of a large residential subdivision. Among its duties were the design, planning, and supervision of the construction of a dam and water drain system, and platting and surveying of the streets. *Id.* at 798. In reverse of the parties' positions here, the plaintiff claimed the allegations stated a contract claim which was not barred by the statute of limitations, while the defendant urged the allegations sounded solely in tort and were barred.

In determining whether the allegations sounded in contract or tort for statute of limitations purposes, the Oklahoma Supreme Court considered two factors: the standard of care and damages. The Court adopted with approval the general versus specific standard of care analysis employed by the Oregon Supreme Court in *Securities-Intermountain, Inc. v. Sunset Fuel Co.*, 289 Ore. 243, 611 P.2d 1158, 1167(1980).

> "If the alleged contract merely incorporates by reference or by implication a general standard of skill and care to which the defendant would be bound independent of the contract, and the alleged breach would also be a breach of this noncontractual duty, then ORS 12.110 [the two year general statute of limitation covering most tort claims] applies. Conversely, the parties may have spelled out the performance expected by the plaintiff and promised by the defendant in terms that commit the defendant to this performance without reference to and irrespective of any general standard. Such a defendant would be liable on the contract whether he was negligent or not, and regardless of facts that might excuse him from tort liability. Or the nature either of the defendant's default or of the plaintiff's loss may be of a kind that would not give rise to liability apart from the terms of their agreement. In such cases, there is no reason why an action upon the contract may not be commenced for the six years allowed by ORS 12.080.

Id. at 800 (citations omitted). The *Flint* Court also observed that the "scope of damages demanded may characterize a complaint as founded in tort rather than in contract." *Id.* However, although the Oklahoma Supreme Court noted that plaintiff alleged defendant's breach of a general, rather than specific, standard of care and the "scope of damages sought could be considered beyond those recoverable under contract theory," the Court nonetheless concluded plaintiff was not precluded from bringing a breach of contract claim. *Id.* at 801. Thus, if the Oklahoma Supreme Court's analysis of standard of care and damages in *Flint* were intended to limit plaintiff to either a claim in tort or contract, the Court declined to do so.

The Oklahoma Supreme Court's reluctance to limit plaintiff's choice of legal remedies is even more apparent in *Great Plains Federal Savings and Loan Ass'n v. Dabney*, 846 P.2d 1088

(Okla. 1993). In *Dabney*, the Oklahoma Supreme Court reversed the dismissal of a breach of oral contract claim against a law firm, holding that a party was not restricted to a malpractice claim against a law firm for failure to adequately search real estate records in a title opinion. Citing *Flint* for the proposition that a party can bring a claim in tort and contract against a professional based on the same set of facts, the Court explained:

> In essence, the holding in Flint Ridge is, if the alleged contract of employment merely incorporates by reference or by implication a general standard of skill or care which a defendant would be bound independent of the contract a tort case is presented governed by the tort limitation period. However, where the parties have spelled out the performance promised by defendant and defendant commits to the performance without reference to and irrespective of any general standard, a contract theory would be viable, regardless of any negligence on the part of a professional defendant. . . .
> . . . .Here, although the gravamen of the petition is in tort we are of the opinion the petition, with attached documents, and the reasonable inferences to be drawn therefrom, are sufficient to plead a special oral contract to diligently and correctly search and report as to the records in the Grady County Clerk's Office from October 1, 1975 to the date of the first title opinion/letter of August 14, 1984.

Id. at 1092 (citations omitted). Indeed, Justice Opala's concurring opinion in *Dabney* expressly finds the "gravamen of the action" irrelevant when the performance of a professional duty arises from contract:

> I would today overrule Seanor [v. Browne, 154 Okl. 222, 7 P.2d 627, 630 (1932)] and excise from our case law the aberrational notion that suits in malpractice against professional defendants, which arise from an express or implied contractual duty, must be pressed exclusively in tort unless the parties have explicitly agreed upon a quality of performance different from that imposed or imposable by law. The orthodoxy of the mainstream common law doctrine would be restored by pronouncing that, where a duty of professional care arises from a contractual relationship, a party's substandard performance is nonetheless actionable in a malpractice action both in contract for the breach of a promise-based obligation and in tort for failure to exercise the degree of care that is due. Extant jurisprudence in conflict with this notion constitutes an incorrect exposition of Oklahoma's common law.

Id. at 1096.

The Court concludes that under Oklahoma law MCD is not limited to bringing a contract claim against defendants. The Chester and USPCI Contracts reference both general and specific standards of care. While the Contracts specify in much detail the duties to be performed by Chester and USPCI in the closure of the impoundments, the Contracts also warrant the defendants' work will be performed "in a good and workmanlike manner by qualified workmen skilled in their respective trades" and "in accordance with the highest standards in the field." *Chester and USPCI Contracts, Special Terms and Conditions* ¶¶ *9 and 23.* And MCD has alleged defendants breached not only the standards set forth in the Contract, but industry standards of care, as well as the regulatory requirements set forth in 40 C.F.R. §265.228(a)(2). Further, the Court is guided by the apparent unwillingness of Oklahoma courts to limit a plaintiff's remedy to contract in cases alleging professional negligence or the negligence of a contractor. *See Dabney*, 846 P.2d at 1092 and 1096; *Smith v. Johnston*, 591 P.2d 1260, 1262-63 (Okla. 1978)(affirming plaintiff's right to proceed on negligence theory at trial and forego contract claim); *Keel v. Titan Const. Corp.*, 639 P.2d 1228, 1232 (Okla. 1981)("Accompanying every contract is a common-law duty to perform it with care, skill, reasonable experience and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of contract."); *McVay v. Rollings Const., Inc.*, 820 P.2d 1331, 1333 (Okla. 1991)(negligence action against contractor for failure to reconnect sewer line); *MBA Commercial Const., Inc. v. Roy J. Hannaford Co.*, 818 P.2d 469 (Okla. 1991)(negligence action against architectural and engineering firm for negligently designing project and preparing the architectural plans and specifications).

Defendants also rely on the "economic loss" doctrine to preclude MCD's negligence claim. The economic loss doctrine bars a plaintiff from bringing a tort claim arising out of a commercial transaction when the damages sought are solely "economic" in nature; *i.e.*, no personal injury or damage to other property. *Raytheon Co. v. McGraw-Edison Co., Inc.*, 979 F.Supp. 858, 866 (E.D.Wis. 1997). Defendants contend that the damages sought by MCD are solely economic losses and therefore MCD's negligence claim should be barred under the doctrine. MCD argues the economic loss doctrine is inapplicable to the facts of this case as Oklahoma has only recognized the economic loss doctrine in manufacturers' product liability cases; it has not extended the doctrine outside that area. Defendants concede there is no Oklahoma case applying the economic loss doctrine outside manufacturers' products liability cases, but invite this Court to find Oklahoma would extend the doctrine's applicability to the facts of this case and adopt the reasoning of the U.S. District Court of the Eastern District of Wisconsin in *Raytheon, supra*, which precluded common law tort claims based on the economic loss doctrine in a case involving the purchase of land contaminated with hazardous waste. The Court declines to so find.

In *Waggoner v. Town & Country Mobile Homes, Inc.*, 808 P.2d 649 (Okla. 1990), the Oklahoma Supreme Court adopted the doctrine set forth in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) and held "in Oklahoma no action lies in manufacturers' products liability for injury only to the product itself resulting in purely economic loss." *Waggoner*, 808 P.2d at 653. In so doing, the Court reasoned that "[t]here is no need to extend manufacturers' product liability into an area already occupied by the UCC," for "to extend manufacturers' products liability to include purely economic losses would undermine the UCC's

'comprehensive and finely tuned statutory mechanism for dealing with the rights of parties to a sales transaction with respect to economic losses.'" *Id. (quoting Clark v. Int'l Harvester Co.*, 581 P.2d 784, 792 (Idaho 1978)). Although the majority limited its holding to manufacturers' products liability claims, four Oklahoma justices dissented. Justice Opala observed that "there is nothing in the UCC's warranty provisions which abrogates common-law remedies for damages from a product's design defect." *Id.* at 655 (Opala, J., concurring in part and dissenting in part). And Justice Wilson noted that "neither Kirkland v. General Motors Corporation, 521 P.2d 1353 (Okla. 1974) [the seminal Oklahoma case recognizing manufacturers' products liability claim] nor our subsequent decisions require a specific kind of damages as a prerequisite to a claim of manufacturers' products liability nor limit damages recoverable under the theory of manufacturers' product liability." *Id.* at 656 (Wilson, J., dissenting).

Given the *Waggoner* majority's limited application of the economic loss doctrine to manufacturers' products liability claims and the dissents' strong objection to even this limited application, the Court is not persuaded that the Oklahoma Supreme Court would extend the scope of the doctrine to a claim of negligent performance of professional services, as is the claim here. The UCC warranty rationale upon which the *Waggoner* majority relied is clearly not relevant to MCD's claim that defendants negligently performed their services in closing the facility; MCD does not complain of a defective product. Further, the Oklahoma Supreme Court does not appear to be willing to preclude a remedy based solely on the type of damages sustained. As discussed above, the Court in *Flint* and *Dabney* refused to limit the respective plaintiffs to a negligence action "[a]lthough the scope of damages sought could be considered beyond those recoverable under contract theory," and instead allowed the plaintiffs to go forward with contract

claims and the trial court to "appropriately limit the scope of the damages available under the appropriate theory." *Flint*, 775 P.2d at 801; *Dabney*, 846 P.2d at 1092. The Court therefore concludes Oklahoma law does not preclude MCD from bringing a negligence action against defendants for breaching their duties in closing the facility.

For the reasons stated above, the Court concludes MCD is not limited to a contract action based on the facts alleged against defendants, and denies defendants motion for summary judgment on MCD's negligence claim.[2]

Conclusion

In accordance with the Court's findings, the Court denies MCD's motion for partial summary judgment and grants defendants' motions for summary judgment on MCD's contractual indemnification claim, and denies defendants' motions for summary judgment on MCD's negligence claims.

The Court sets this case for status conference on November 23, 1998 at 9:30 a.m. Out of state counsel may appear by telephone.

IT IS SO ORDERED this 17th day of November, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[2] In finding MCD can proceed with its negligence claim against defendants, the Court is not thereby ruling on any statute of limitations defense to that claim which defendants suggest they may wish to pursue after discovery.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TRACEY MANNS)
)
Plaintiff,)
)
vs.) No. 97-CV-931-B
)
)
THE CITY OF TULSA, et. al.,)
)
Defendants.)

ORDER

Comes on for hearing Defendants' Keith Eddings ("Eddings"), Mark Brisban ("Brisban") and Karen Tipler's ("Tipler") Motion to Dismiss, (Docket no. 6); Defendants' Bill Yelton ("Yelton"), Harold Adair ("Adair") and Jim Clark's ("Clark") Motion to Dismiss, (Docket no. 10); and, Defendants' Leland Ashley ("Ashley"), Bruce Bonham ("Bonham") and Joel Spitler's ("Spitler") Motion to Dismiss, (Docket no. 16), in which the various Defendants have asserted Okla. Stat. Ann. tit. 12, § 95's two-year statute of limitations' bars Tracey Manns' ("Manns") 42 U.S.C.§1983 ("Section 1983") claim and naming a party "John or Jane Doe" does not toll the applicable statute of limitations.

BACKGROUND

On October 14, 1997, Manns filed her complaint in this Court alleging that on October 15, 1995, the City of Tulsa ("City") and six of its police officers violated

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Manns' civil rights pursuant to Section 1983. She alleges that the officers erroneously executed a search warrant at Manns' home. In her original complaint, Manns named the police officers "John Doe 1, John Doe 2, John Doe 3, John Doe 4, John Doe 5 and Jane Doe." At Case Management Conference held February 27, 1998 the Court directed the City to provide the names of the officers and granted Manns leave to amend her complaint to include the names of these individuals.

On April 2, 1998, Manns filed her amended complaint substituting newly-named defendants Ashley, Bonham, Eddings, Brisban, Yelton, Spitler, Adair, Clark and Tripler for the officers John Doe numbers one through five and Jane Doe. Subsequently, the newly-named officers filed the above-referenced motions to dismiss.

LEGAL ANALYSIS

The officers contend that Okla. Stat. Ann. tit. 12, §95 is the applicable two-year statute of limitations which the Court should apply to Manns' Section 1983 claim. Manns does not dispute this. Indeed, it is well settled that the applicable state statutes of limitations for personal injury actions apply to Section 1983 claims. See *Wilson v. Garcia*, 471 U.S. 261, 266-67, 280 (1985); see also *Owens v. Okure*, 488 U.S. 235, 242 n. 6 (1989); and *Meade v. Grubbs*, 841 F.2d 1512, 1523 (10th Cir. 1988). The most analogous Oklahoma statute to a personal injury action is 12 O.S. §95, which creates a two-year statute of limitations for "an action for injury to the rights of another." Okla.Stat.Ann. tit. 12, § 95(3) (West Supp. 1998); see also *Abbitt v. Franklin*, 731 F.2d 661, 663 (10th Cir. 1984) (held that the most analogous Oklahoma statue was the two-

year limitations period for an injury to rights of another). It is also undisputed that the Amended Complaint was filed outside the two-year limitations period.

The dispositive issue, then, is whether that limitations period is tolled by the naming of "John or Jane Does" in the Complaint so as to allow the filing of the Amended Complaint to relate back to the original Complaint. The Court finds it is not and the Motions to Dismiss should be granted.

F.R.C.P. 15(c) provides that "amendment of a pleading relates back to the date of the original pleading when:

> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, *but for a mistake*

concerning the identity of the proper party, the action would have been brought against the party. (emphasis added)

Manns must satisfy the requirements set out in Rule 15(c)(3), or her claims against the newly-named officers are barred by the two-year limitations period. Manns argues that all the requirements were indeed satisfied. She asserts that because she served the original complaint on the same attorney who is representing the newly-named officers, the attorney's notice should be imputed to the newly-named officers. She further urges that because the officers received notice, they would not be prejudiced in maintaining a defense on the merits.

In support of her position, Manns cites *Varrone v. Bilotti*, 867 F. Supp. 1145 (E.D.N.Y. 1994), reversed on other grounds, 123 F.3d 75. The Court finds *Varrone* inapplicable. The Court first notes it is not bound to follow a district court opinion. However, such opinions are sometimes helpful where they contain reasoning which could be persuasive in a fact situation not addressed by this circuit. The Tenth Circuit has, however, previously addressed this issue.

The holding in *Varrone* is contrary to the law of the Tenth Circuit, as well as most the other circuits. Indeed, most courts faced with this issue, have interpreted Rule 15(c)(3) to permit an amended complaint to relate back to the original complaint only when the newly-named party would have been included in the original complaint but for the plaintiff's "mistake." *See Moore v. Doe*, 13 F.3d 406, 1993 WL 538914 (10th Cir. 1993) (Unpublished Disposition); *Waston v. Unipress, Inc.*, 733 F.2d 1386 (10th Cir.

1984); *see also Jacobsen v. Osborne*, 133 F.3d 315, 319-21 (5th Cir. 1998); *Rendall-Speranza v. Nassim*, 107 F.3d 913, 917-19 (D.C. Cir. 1997); *Cox v. Treadway*, 75 F.3d 230, 239-40 (6th Cir. 1996); *Barrow v. Whethersfield Police Dept.*, 66 F.2d 466 (2nd Cir. 1995); *Wilson v. United States Government*, 23 F.3d 559, 563 (1st Cir. 1994); *Worthington v. Wilson*, 8 F.3d 1253, 1255-57 (7th Cir. 1993); and *Western Contracting Corp. v. Everist*, 885 F.2d 1196, 1201 (4th Cir. 1989). Naming a party "John Doe" because such party's true identity is unknown, is not a "mistake" under Rule 15(c)(3).

In *Moore*, the plaintiff brought a Section 1983 claim against two officers, one of which was named "John Doe" in the original complaint. *See* 1993 WL 538914. Subsequently the plaintiff filed an amended complaint in which he replaced "John Doe" with the true identity of the officer. *See id.* The Tenth Circuit held that the plaintiff's amended complaint did not relate back to the original complaint and consequently, the two-year statute of limitations barred the plaintiff's complaint against the newly-named officer. *See id.* The Court held that "the naming of a John Doe defendant constitutes a change of parties within the scope of Rule 15(c), and does not operate to toll the statute of limitations." *Id. See also Watson*, 733 F.2d at 1387-89 (under older version of Rule 15(c), the Tenth Circuit held that the naming of John Doe defendant does not operate to toll the statute of limitations), and see *Jacobsen*, 133 F.3d at 320, citing *Barrow*, 66 F3d at 469 (holding that the amended Rule 15(c) was meant to allow an amendment changing the name of a party to relate back to the original complaint only if the change is the result of an error, such as misnomer or misidentification); *Wilson*, 23 F.3d at 563 (held that

"mistake" under Rule 15(c) does not include the lack of knowledge of the proper party); and *Worthington*, 8 F.3d at 1257 (holding that the 1991 amendment to Rule 15(c) does not affect prior holding that naming defendants as "unknown police officers" does not toll the statute of limitations). Similarly, the naming of "John and Jane Doe" defendants in Manns' original complaint does not toll the statute of limitations. Consequently, Manns' complaint against the newly-named officers should be dismissed because the Oklahoma two-year statute of limitations bars her claim against the newly-named officers.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' Motions to Dismiss (Docket no.s 6, 10 and 16) are granted.

DONE THIS 16TH DAY OF NOVEMBER, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TRACEY MANNS)
)
Plaintiff,)
)
vs.) No. 97-CV-931-B
)
)
THE CITY OF TULSA, et. al.,)
)
Defendants.)

JUDGMENT

This action came on for hearing before the Court, Honorable Thomas R. Brett, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that Plaintiff, Tracey Manns, take nothing from the Defendants, Keith Eddings, Mark Brisban, Karen Tipler, Bill Yelton, Harold Adair, Jim Clark, Leland Ashley, Bruce Bonham, and Joel Spitler, that the action be dismissed on the merits as to these named Defendants. and that the Defendants recover their costs of action upon timely application pursuant to ND L.R. 54.1. Each party shall

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pay their own attorney fees.

DATED THIS 16 DAY OF NOVEMBER, 1998 AT TULSA, OKLAHOMA.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAT JOHNSON, JR.

Plaintiff,

vs.

CITY OF CLAREMORE,

Defendant.

Case No. 97-CV-1115-B

ORDER

Before the Court is the motion for summary judgment filed by defendant, City of Claremore (the "City") (Docket No. 13).

Plaintiff Pat Johnson ("Johnson") alleges the City discriminated against him on the basis of age and in violation of the Age Discrimination in Employment Act ("ADEA"), and the City breached its contract with him when it terminated Johnson's employment without a pre-termination hearing.

The City moves for summary judgment asserting that Johnson has failed to meet his initial burden of establishing a *prima facie* case of age discrimination, and failed to establish he had a contract with the City. In his response, Johnson concedes his ADEA claim and seeks to dismiss the claim with prejudice.[1] However, Johnson argues he has a breach of contract claim against the City based on a third party beneficiary right under the City Charter.

[1] The City objects to the dismissal. At this stage of the proceedings, the Court denies leave to dismiss the ADEA and enters summary judgment on the claim in favor of the City.

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Undisputed Facts

In April 1979, Johnson worked for the City as a Park Foreman until the City promoted him to Superintendent of the Water and Sewer Department in 1981, where he remained until the City terminated his employment on February 26, 1997. Before his employment was terminated, the City reprimanded Johnson numerous times for poor job performance, violation of the City's policies, insubordination, falsification of records, and various other improper activities. *Defendant's Exhibits 3-21.*

When the City hired Johnson, it provided all its employees with a Policy and Procedure Handbook for Employees ("Handbook"), which contained the following provision:

> An employee's acceptance of a copy of these personnel policies does not constitute an employment contract. These policies should not be construed as and do not guarantee employment for any specific duration. *All employees will be "at will"; that is, an employee may quit or be suspended, demoted, or terminated without reason and without notice.* This manual is simply a tool used to communicate to all employees the Personnel Policies of the City of Claremore.

Defendant's Exhibit 23, City of Claremore 1993 Policy and Procedure Hanbook for Employees. (emphasis added.).

In 1994, the City adopted a City Charter ("Charter"), which contained the following provisions:

> Appointments and promotions in the service of the City shall be made solely on the basis of merit and fitness; and removals, demotions, suspensions, and layoffs shall be made solely for the good of the service.

Claremore City Charter, Article IV, Section 4.02(a).

> [T]he City council shall within twelve (12) months after the effective date of this Charter provide by ordinance for the establishment, regulation and maintenance of a merit system governing personnel policies necessary to effective administration of the employees of the City's departments, offices and agencies, including but not limited to classification and pay plans, examinations, force reduction, removals,

> working conditions, provisional and exempt appointments, in-service training, grievances and relationships with employee organizations.

Claremore City Charter, Article IV, Section 4.02(b). The Charter did not establish a right to a pre-termination hearing for the City's employees, nor were any policies or procedures promulgated pursuant to the Charter establishing such a right at the time the City terminated Johnson's employment.

Summary Judgment Standard

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342, 345 (10th Cir. 1986). In *Celotex,* the Supreme Court stated:

> [t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts sufficient to raise a "genuine issue of material fact." *Anderson,* 477 U.S. at 247-48.

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 250. In its review, the Court must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

Analysis

Johnson fairly characterizes his breach of contract claim as "convoluted and imaginative." *Response, p 1.* Apparently, Johnson argues he possesses a third-party beneficiary right to a pre-termination hearing under Section 4.02(b) of the City's Charter because the City would have created the right to a substantive pre-termination procedure if the City had comported with the Charter's mandate to provide by ordinance a merit system which governed the removal of employees. *Id.* at 1-2. Johnson asserts that while the Charter does not expressly provide for a pre-termination hearing, the City should have provided this right by ordinance within the twelve months after the City adopted the Charter. And because the City failed to establish a procedure for pre-termination hearings within the twelve months, Johnson became a beneficiary of a procedure for a pre-termination hearing that was not ever promulgated -- but should have been. In other words, Johnson appears to assert that after the City adopted the Charter but before the expiration of twelve months, no pre-termination hearing existed. After the twelve month period

expired, however, a right to a pre-termination hearing came into existence, because the City should have adopted such a procedure.

In support of his argument, Johnson relies on *Kester v. City of Stilwell*, 933 P.2d 952 (Okla. Ct. App. 1997) for the proposition that procedures for pre-termination hearings must scrupulously be followed before an employer may terminate an employee, if the employer's policies and procedures require such a hearing. However, the obvious difference between the facts here and those in *Kester* is that there are no procedures for a pre-termination hearing to be scrupulously followed. Johnson cannot claim a contractual right to a substantive procedure which does not and may never exist. The Court concludes Johnson has failed to establish any contract right to a pre-termination hearing.

Neither can Johnson claim a violation of procedural due process. At no point during his employment did Johnson have a protected property interest in future employment with the City. The earlier Handbook clearly stated "[a]ll employees will be 'at will'; that is, an employee may quit or be suspended, demoted, or terminated without reason and without notice." Further, the City Charter which was in effect at the time of Johnson's termination states: "removals, demotions, suspensions, and layoffs shall be made solely for the good of the service." Thus, the City could terminate Johnson's at-will employment upon its determination that such would be "for the good of the service." This determination is within the discretion of the City and the Oklahoma Supreme Court has specifically held that language requiring removal "solely for the good of the service" does not limit the right of the City to terminate at-will employees and does not create any protected property interest in future employment. *Hall v. O'Keefe*, 617 P.2d 196, 200-01 (Okla. 1980); *Kester*, 933 P.2d at 953; *Phillips v. Calhoun*, 956 F.2d 949, 951 (10th Cir.

1992)(Applying Oklahoma law, the circuit court concluded "employment conditioned on such terms as 'for the good of the service' does not, under applicable law, give rise to a cognizable property interest for due process purposes.").

Accordingly, the Court finds no merit in either of Johnson's claims and grants Defendant's Motion for Summary Judgment with respect to Johnson's breach of contract and ADEA claims (Docket No. 13).

IT IS SO ORDERED, this 17 day of November, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAT JOHNSON, JR.,

Plaintiff,

vs.

CITY OF CLAREMORE,

Defendant.

Case No. 97-CV-1115-B

JUDGMENT

In accord with the Order filed this date sustaining Defendant City of Claremore's Motion for Summary Judgment, the Court hereby enters judgment in favor of Defendant City of Claremore and against Plaintiff Pat Johnson, Jr. Costs are hereby assessed against Plaintiff Pat Johnson, Jr. The parties are to pay their respective attorneys' fees.

Dated, this 17th day of November, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TONY R. MORRISON, **SSN: 446-64-6438,**	)	
Plaintiff,	)	
v.	)	**Case No. 97-CV-0070-EA**
KENNETH S. APFEL, **Commissioner of Social Security,**[1]	)	ENTERED ON DOCKET DATE NOV 18 1998
Defendant.	)	

ORDER DENYING
DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT

At issue before the Court is Defendant's Motion to Alter or Amend Judgment (Docket # 21-1), filed November 2, 1998. The Order and Judgment from which defendant seeks relief was issued on October 19, 1998. In that Order, the Court reversed the decision of the Administrative Law Judge ("ALJ") and remanded this matter for an immediate award of benefits to the claimant, Tony R. Morrison, who suffered from migraine headaches, among other things.

Defendant's motion is something of a procedural anomaly. In a veiled attempt to appeal the Order and Judgment to the District Court (instead of the Tenth Circuit) and thus circumvent Fed.R.Civ.P. 73(c), defendant requests that the Court overrule, reverse or reject the Magistrate's "report" or "recommendation" remanding the case for an award of benefits. (Motion to Alter, *passim*). The Court did not issue a report and recommendation; it issued an Order and Judgment because, as claimant points out, defendant consented to proceed before a United States Magistrate

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[1] Effective September 29, 1997, pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need to be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

(23)

Judge pursuant to 28 U.S.C. § 636(c). (Response to Motion to Alter, Docket # 22-1, at 1.) The Court will treat the motion as a Rule 59(e) motion.

A motion to amend or alter should be granted only to correct manifest errors of law or to present newly discovered evidence. Phelps v. Hamilton, 122 F.3d 1309 (10th Cir. 1997). Defendant presents no newly discovered evidence, but contends that the Court erred by failing to require that the claimant establish his alleged impairment by objective medical evidence. (Motion to Alter, at 7.) More generally, defendant specifically alleges that the Court "failed to acknowledge explicit law of this Circuit and Social Security regulations which are directly on point and determinative of the issues involved in this case." (Motion to Alter, at 1.) The Order is not inconsistent with Tenth Circuit law. See, e.g., Pennington v. Chater, Case No. 96-5177, 1997 WL 297684 (10th Cir. June 5, 1997); Guinn v. Chater, Case No. 95-7127, 1996 WL 211140 (10th Cir. April 30, 1996); Volak v. Chater, Case No. 94-6331, 1995 WL 490295 (10th Cir. Aug. 16, 1995). The Court finds no manifest error of law that needs to be corrected. Accordingly, Defendant's Motion to Alter or Amend Judgment is **DENIED**.

DATED this 17th day of November, 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LARRY JAMES CARTER,

Plaintiff,

vs.

STATE OF OKLAHOMA; STANLEY GLANZ, Sheriff; HOWARD PEEPLES; DOCTOR FRANKLIN for Wexford Health Source,

Defendants.

No. 98-CV-530-E (J)

ORDER

On July 17, 1998, Plaintiff submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983. By order entered August 26, 1998, the Court informed Plaintiff of deficiencies in his papers. Specifically, Plaintiff was advised that this action could not proceed unless he paid the initial partial filing fee of $8.83 by September 28, 1998 pursuant to 28 U.S.C. §1915(a). Plaintiff was also ordered to submit an amended complaint with enough copies of the complaint, summons and USM forms for service upon the named Defendants. In addition, the Clerk of Court was directed to mail to Plaintiff the forms and information necessary for preparing the documents ordered by the Court. Plaintiff was also advised that these deficiencies were to be cured by September 28, 1998, and that "failure to comply . . . will result in dismissal without prejudice of Plaintiff's complaint." To date, Plaintiff has neither submitted the required documents nor the initial partial filing fee. In addition, no correspondence from the Court to Plaintiff been returned.

Because Plaintiff has neither paid the initial partial filing fee nor submitted the required documents in compliance with the Court's Order of August 26 1998, the Court finds that this action may not proceed and should, therefore, be dismissed without prejudice for failure to prosecute.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's civil rights *Complaint* is **dismissed without prejudice** for lack of prosecution.

SO ORDERED this 11th day of November, 1998.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHRISTINE ROWLAND, and
TAMARA ROWLAND, a minor,
by and through her parent
and guardian,
CHRISTINE ROWLAND,

Plaintiffs,

vs.

DILLARD'S, INC.,
a Delaware Corporation,

Defendant.

No. 97-CV-917-B(M)

ORDER

The Court has before it for decision Defendants Application for Attorney's Fees (Docket No. 40) to which no objection has been filed. Defendant seeks $288.00 in attorney's fees pursuant to the Court's Order entered September 15, 1998, remanding the case to Tulsa County District Court and awarding Defendant attorney's fees incurred in the removal of this action from state to federal court.

The Court has reviewed the application, affidavit, brief and bill of costs itemizing the time spent filed in support and finds the amount of attorney's fees sought is reasonable under the circumstances.

IT IS THEREFORE ORDERED that Defendant is awarded an attorney's fee in

the amount of $288.00 pursuant to 28 U.S.C. § 1924.

ENTERED THIS 16th DAY OF NOVEMBER, 1998.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARCEL JACKSON,)
)
Petitioner,)
)
vs.) Case No. 98-CV-026-B (J)
)
RON CHAMPION,)
)
Respondent.)

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 16th day of Nov., 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARCEL JACKSON,

Petitioner,

vs.

RON CHAMPION,

Respondent.

Case No. 98-CV-026-B (J)

ORDER

Before the Court is Respondent's motion to dismiss petition for habeas corpus as time barred by the statute of limitations (Docket #3). Petitioner, a state inmate appearing *pro se*, has filed a response to the motion to dismiss and supporting brief (#5). Petitioner has also filed a "conditional motion for authorization to amend petition for writ of habeas corpus and motion for authorization to file opening brief" (#6). Respondent's motion to dismiss is premised on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. For the reasons discussed below, the Court finds that the petition is not timely filed and Respondent's motion to dismiss should be granted. Petitioner's "conditional motions" should be denied.

BACKGROUND

On January 4, 1994, Petitioner entered his plea of *nolo contendere* in Tulsa County District Court, Case No. CRF-93-1123, to a charge of Unlawful Possession of a Controlled Drug, After Former Conviction of a Felony. He was sentenced to 20 years imprisonment and a fine of five hundred dollars ($500.00). (See #4, Ex. A). Petitioner filed a timely motion to withdraw the plea which was denied by the district court. Petition appealed the denial of his motion to withdraw plea

to the Court of Criminal Appeals where the district court's denial of the motion was affirmed on October 6, 1994. (#4, Ex. A). Nothing in the record indicates Petitioner filed a petition for *certiorari* in the United States Supreme Court.

Petitioner filed an application for post-conviction relief in the state trial court on June 18, 1996 (#4, Ex. B). That court denied relief on July 29, 1996. (#4, Ex. C). Petitioner filed his petition in error in the Oklahoma Court of Criminal Appeals on September 3, 1996 (#4, Ex. D). The appellate court dismissed the appeal as untimely on December 23, 1996 (#4, Ex. E).

Respondent states that on February 14, 1997, Petitioner filed a request for a post-conviction appeal out of time in the state district court. That court denied the requested relief on March 10, 1997 (#4, Ex. F). Petitioner filed a timely appeal in the Oklahoma Court of Criminal Appeals (#4, Ex. G), but the appellate court affirmed the district court's denial of relief on May 12, 1997 (#4, Ex. H). The instant federal petition for writ of habeas corpus was received for filing in this Court on January 12, 1998 (#1).

ANALYSIS

The AEDPA, enacted April 24, 1996, established a one-year limitations period for habeas corpus petitions as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing

by such State actions;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which a prisoner's direct appeal from his conviction became final, a literal application of the AEDPA limitations language would result in the preclusion of habeas corpus relief for any prisoner whose conviction became final more than one year before enactment of the AEDPA. Recognizing the retroactivity problems associated with that result, the Tenth Circuit Court of Appeals has held that for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitation does not begin to run until April 24, 1996. United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997). In other words, prisoners whose convictions became final before April 24, 1996, the date of enactment of the AEDPA, were afforded a one-year grace period within which to file for federal habeas corpus relief.

Recently, the Tenth Circuit Court of Appeals also ruled that the tolling provision of 28 U.S.C. § 2244(d)(2) applies to toll the one-year grace period afforded by Simmonds. Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998). Therefore, the one-year grace period is tolled during time spent pursuing properly filed state post-conviction relief.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Because Petitioner failed to petition the United States Supreme Court for *certiorari*, his conviction became final on January 4, 1995, ninety (90)

days after the Oklahoma Court of Criminal Appeals denied Petitioner's petition for *certiorari*. See Caspari v. Bohlen, 510 U.S. 383, 390 (1994). Therefore, his conviction became final before enactment of the AEDPA. As a result, his one-year limitations clock began to run on April 24, 1996, when the AEDPA went into effect.[1] Petitioner filed his petition on January 12, 1998, or 629 days after April 24, 1996. However, the time during the grace period when Petitioner had "a properly filed application for State post-conviction or other collateral review" should be subtracted from this 629 days. Thus, the 41 days from June 18, 1996 (when Petitioner filed his application for post-conviction relief in the state district court) to July 29, 1996 (when the state district court denied post-conviction relief) should not be counted.[2] In addition, the 87 days from February 14, 1997 (when Petitioner filed his application for post-conviction appeal out of time in the district court) to May 12, 1997 (when the Oklahoma Court of Criminal Appeals affirmed the district court's denial of the application for post-conviction appeal out of time) should not be counted. After deducting those 128 days spent by Petitioner pursuing "properly filed" post-conviction applications, the resulting elapsed time on Petitioner's limitations period is 501 days, well beyond the one-year limit. Therefore, the Court concludes that Respondent's motion to dismiss this petition as time-barred should be granted.

In his "conditional motion," Petitioner argues that this Court should deduct the 111 days from September 3, 1996 to December 12, 1996, i.e., the period his untimely appeal was pending at the

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[1]In his response to Respondent's motion to dismiss, Petitioner argues that his one year limitations period began to run May 12, 1997, the date he "finished with exhausting his state remedies." #5 at 7. Therefore, Petitioner concludes he had until May 12, 1998 to file timely his federal petition for writ of habeas corpus. However, Petitioner cites no law to support his argument and the Court finds the argument unpersuasive.

[2]The Court will not count the additional time during which Petitioner appealed the denial of his application for post-conviction relief because that appeal was dismissed by the Oklahoma Court of Criminal Appeals as untimely. Section 2244(d)(2) requires a court to subtract time only for the period when the petitioner's "properly filed" post-conviction application is being pursued. See 28 U.S.C. § 2244(d)(2); see also Hoggro v. Boone, 150 F.3d 1223, 1226-27 n.5 (10th Cir. 1998).

Oklahoma Court of Criminal Appeals, from the elapsed period. However, as discussed above, the Court finds that Petitioner's post-conviction proceedings were not "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2) during that 111 day period. See Hoggro, 150 F.3d at 1226-27. The Court concludes that the relief requested by Petitioner in his "conditional motions" should be denied.

CONCLUSION

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year limitations period, Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted. The relief requested by Petitioner in his "conditional motion for authorization to amend petition for writ of habeas corpus and motion for authorization to file opening brief" should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations (#3) is **granted**.
2. Petitioner's conditional motion for authorization to amend petition for writ of habeas corpus and motion for authorization to file opening brief (#6) is **denied**.
3. The petition for writ of habeas corpus is **dismissed with prejudice**.

SO ORDERED THIS 16 day of Nov., 1998.

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MERIN J. OAKLEY a/k/a M.J. Oakley

Plaintiff,

vs.

No. 98-CV-0133-B(M)

MARVIN T. RUNYON, Postmaster General
UNITED STATES POSTAL SERVICE

Defendants.

ORDER

Comes on for hearing Defendants' Special Appearance, Suggestion of Improper Service and Request for Dismissal filed June 19, 1998 (Docket #2) and Renewal of Defendants' June 19, 1998 Suggestion of Improper Service and Request for Dismissal (Docket # 3) and the Court find the same should be granted.

Defendants Request for Dismissal and subsequent renewed request is based upon failure of Plaintiff to obtain service on the named Defendants. Defendants state a copy of the "Complaint" was faxed to the United States Postal Service Memphis Law Office. The United States Attorney has never been served. Defendants assert dismissal is therefore appropriate pursuant to Federal Rules of Civil Procedure 4(i) and 4(m). Rule 4(i) requires

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Plaintiff to deliver or mail by certified or registered mail a copy of the summons and complaint to the United States Attorney for the district in which the action is brought. Additionally, the rule requires that summons and complaint be mailed by certified or registered mail to the Attorney General in Washington D.C. Plaintiff has failed to meet these requirements. Absent proper compliance, this Court is without jurisdiction to hear Plaintiff's Complaint.

Additionally, Rule 4(m) requires service must occur within 120 days of the filing of the Complaint, which in this case occurred on February 17, 1998. Dismissal is mandated if this time frame is not met.

Plaintiff was properly served with Defendants' June 19, 1998 pleading and wholly failed to respond by filing an objection to the pleading, requesting additional time or taking any corrective action. Accordingly, Defendants' Request for Dismissal is granted.

IT IS SO ORDERED this 16th day of November, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NELLIE BOND,

Plaintiff,

v.

ATLANTIC RICHFIELD COMPANY, and CHEVRON U.S.A., INC.,

Defendants.

Case No. 98-CV-0619E-(J)

NOTICE OF DISMISSAL WITHOUT PREJUDICE OF NELLIE BOND

Pursuant to Rule 41 (a) (1) of the Federal Rules of Civil Procedure, the Plaintiff, Nellie Bond, by and through her attorney of record, James E. Frasier, of Frasier, Frasier & Hickman herewith dismisses without prejudice her claim in the above entitled cause.

Dated this 16th day of November, 1998.

Respectfully submitted,

FRASIER, FRASIER & HICKMAN

By: _____

James E. Frasier, OBA # 3108
Gary W. Pilgrim, OBA # 17121
1700 Southwest Boulevard
P.O. Box 799
Tulsa, OK 74101
(918) 584-4724

And

Robert N. Barnes OBA # 537
Michael E. Smith OBA # 8385
Roy B. Short, OBA # 14318
701 Northwest 63rd Street, Suite 500
(405) 843-0363

And

Jessie V. Pilgrim OBA # 11152
2010 Utica Square, Suite 306
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(918) 743-1383

ATTORNEYS FOR THE PLAINTIFFS

CERTIFICATE OF MAILING

I hereby certify that on the 16th day of November, 1998, I mailed a true and correct copy of the foregoing instrument to:

Steven J. Adams
Attorney at Law
200 ONEOK Plaza
100 West Fifth Street
Tulsa, OK 74103-2929

Robert E. Meadows
Attorney at Law
Suite 800
333 Clay Avenue
Houston, TX 77002-4086

Mike Jones
Attorney at Law
116 N. Elm Street
Bristow, OK 74010

with proper postage thereon fully prepaid.

James E. Frasier

F I L E D

NOV 1 6 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PARKER DRILLING COMPANY,	§	
	§	
Plaintiff,	§	
V.	§	**CIVIL ACTION NUMBER**
	§	**97CV1061BU(M)**
	§	
ALEXANDER & ALEXANDER OF TEXAS, INC.,	§	
	§	ENTERED ON DOCKET
	§	
Defendant.	§	DATE 11/17/98

ORDER OF DISMISSAL WITH PREJUDICE

The Court has been informed by the parties that all outstanding issues between them relating to the subject matter of this lawsuit have been amicably resolved, and that as a part of that agreement, all parties request that this case be dismissed with prejudice to refiling it.

Accordingly, pursuant to the Settlement Agreement of the parties, this case is hereby DISMISSED WITH PREJUDICE. All costs are taxed against the party incurring same.

SIGNED this 16th day of November, 1998.

Honorable Michael Burrage
United States District Judge

APPROVED AS TO FORM
AND SUBSTANCE:

Bart Wulff
State Bar No. 22086100
COHAN, SIMPSON, COWLISHAW
& WULFF, L.L.P.
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ATTORNEYS FOR PLAINTIFF

60450

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARVIN SAMPLE,

Plaintiff,

vs.

NORRIS SUCKER RODS, a Dover Resources Inc. Company,

Defendant.

Case No. 98-CV-364-BU

ORDER

This matter comes before the Court upon Defendant's Motion to Dismiss, wherein Defendant seeks, pursuant to Rule 41(b), Fed. R. Civ. P., to dismiss Plaintiff's action for failure to prosecute. The record reflects that Plaintiff has not responded to the motion within the time prescribed by Rule 7.1(C), Local Civil Rules of the United States District Court for the Northern District of Oklahoma and has not requested an extension of time to respond to the motion. Pursuant to Rule 7.1(C), the Court, in its discretion, deems the motion confessed. The Court finds that Plaintiff's action should be dismissed without prejudice for the specific reasons stated in Defendant's motion.

Accordingly, Defendant's Motion to Dismiss (Docket Entry #24) is GRANTED. Plaintiff's action is DISMISSED WITHOUT PREJUDICE.

ENTERED this 16th day of November, 1998.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

(35)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MAIA TRELEAVEN, and TYRONE TRELEAVEN,	)	
Plaintiffs,	)	
vs.	)	Case No. 98CV 0745C (M)
CREDIT BUREAU SERVICES OF MISSOURI INC., d/b/a/ CREDIT BUREAU SERVICES-MW. DIV. OF CBC, a Missouri corporation,	)	
Defendant.	)	

ENTERED ON DOCKET
DATE NOV 16 1998

FILED
NOV 13 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

DISMISSAL

COMES NOW the Plaintiff and hereby dismisses the above cause with prejudice.

Dated this 12th day of November, 1998.

CRUTCHFIELD & ASSOCIATES. P.C.

Darlene Crutchfield

Darlene Crutchfield, OBA 14210
616 South Main Suite 106
Tulsa, OK 74119
(918) 587-9100

Attorney for Plaintiff

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing was mailed on the 12th day of November, 1998, by U.S. mail, postage fully prepaid, to:

Amy Goldstein, Esq.
366 East Broad Street
Columbus, OH 43215

Darlene Crutchfield

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM MURPHY, an individual,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 97-CV-1070-K**
	)	
AMERICAN STATES INSURANCE COMPANY, INC., an Indiana corporation, d/b/a in Oklahoma,	)	
	)	
Defendant/Third-Party,	)	
	)	
vs.	)	
	)	
KANSAS FARM BUREAU MUTUAL INSURANCE COMPANY, a Kansas corporation,	)	
	)	
Third-Party Defendant.	)	

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised that the parties to this action have agreed to a settlement, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 13 day of November, 1998.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RENARD ELVIS NELSON,)
)
Plaintiff,)
)
vs.) No. 98-CV-360-K (M)
)
STANLEY GLANZ, Sheriff; and)
CAPTAIN TURLEY, Jail Administrator,)
)
Defendants.)

ORDER

On May 14, 1998, Plaintiff submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983, together with a motion for leave to proceed in forma pauperis. By order entered May 28, 1998, the Court informed Plaintiff of deficiencies in his papers. Plaintiff was directed to submit certified copies of his trust fund accounting for the 5 month period preceding the filing of his complaint pursuant to 28 U.S.C. §1915(a). In addition, the Clerk of Court was directed to mail Plaintiff the forms and information necessary for preparing the documents ordered by the Court. Plaintiff was also advised that these deficiencies were to be cured by June 26, 1998, and "failure to comply . . . will result in dismissal without prejudice of Plaintiff's complaint."

On June 25, 1998, Plaintiff filed a supplement to the in forma pauperis motion. On July 15, 1998, the Court granted leave to proceed in forma pauperis and directed Plaintiff to pay an initial partial filing fee of $15.69 by August 5, 1998. To date, Plaintiff has not paid the initial partial filing fee. In addition, no correspondence from the Court to Plaintiff has been returned.

Because Plaintiff has failed to pay the initial partial filing fee in compliance with the Court's Order of July 15, 1998, the Court finds that this action may not proceed and should, therefore, be dismissed without prejudice for failure to prosecute.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is **dismissed without prejudice** for lack of prosecution.

SO ORDERED this 13 day of November, 1998.

TERRY C. KERN, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAUL J. ATKINS,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 98-CV-221-J

JUDGMENT

This action has come before the Court for consideration and an Order reversing the Commissioner's denial of benefits and remanding the case to the Commissioner for further proceedings has been entered. Consequently, Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 13th day of November 1998.

Sam A. Joyner
United States Magistrate Judge

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

(14)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAUL J. ATKINS,

Plaintiff,

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY)

Defendant.

Civil Action No. 98-CV-221-J

ORDER

Upon the motion of the Defendant, Commission of Social Security, by and through his attorneys of record, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action.

DATED this 13 day of November, 1998.

Sam A. Joyner
United States Magistrate Judge

(13)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

KAREN GULLEY,
SSN: 444-42-6200

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-CV-946-J

JUDGMENT

This action has come before the Court for consideration and an Order reversing the Commissioner's denial of benefits and remanding the case to the Commissioner for further proceedings has been entered. Consequently, Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 13th day of November 1998.

Sam A. Joyner
United States Magistrate Judge

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

KAREN GULLEY,
SSN: 444-42-6200

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-CV-946-J

ORDER[2/]

Plaintiff, Karen Gulley, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.[3/] Plaintiff asserts that the Commissioner erred because (1) the ALJ's RFC findings are not supported by substantial evidence, (2) the ALJ did not provide adequate reasons for disregarding the opinion of Plaintiff's treating physician, (3) the ALJ's findings on Plaintiff's credibility are not supported by substantial evidence, and (4) the ALJ relied on an improper

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1/ On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

2/ This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

3/ Administrative Law Judge Richard J. Kallsnick (hereafter "ALJ") concluded that Plaintiff was not disabled on May 6, 1996. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on August 14, 1997. [R. at 4].

(11)

hypothetical question. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born April 27, 1943, and was 52 years old at the time of the hearing before the ALJ. [R. at 191]. Plaintiff was injured at work when she fell on January 8, 1993. Plaintiff was treated conservatively for back pain. The treatment did not relieve Plaintiff's pain. Testing revealed a disc herniation at L4-5, and Plaintiff had a laminectomy on July 20, 1993. [R. at 113]. The surgery was deemed unsuccessful by Plaintiff's surgeon, and Plaintiff had subsequent surgery on March 15, 1994. [R. at 125]. Plaintiff additionally suffered from plantar fascitis, but her treating physician noted that Plaintiff was asymptomatic and that her feet were "not a source of disability." [R. at 140].

An RFC completed by Thurma Fiegel on February 17, 1995, indicated that Plaintiff could occasionally lift ten pounds, frequently lift less than ten pounds, stand two hours, sit two hours, and occasionally climb, stoop, or crouch. [R. at 80].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). The Commissioner has established a five-step process for the evaluation of social security claims.[4/] See 20 C.F.R. § 404.1520.

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the

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[4/] Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[5/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. REVIEW

SUBSTANTIAL EVIDENCE TO SUPPORT RESIDUAL FUNCTIONAL CAPACITY FINDING

Plaintiff initially asserts that the ALJ lacked substantial evidence to support the ALJ's finding as to Plaintiff's Residual Functional Capacity ("RFC"). Plaintiff states

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5/ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

that no specific evidence supports the ALJ's conclusion "that Plaintiff can perform less than a full range of light work." Plaintiff's Brief at 3. Plaintiff states that this burden is on the Commissioner at Step Five, and that the Commissioner has failed to meet his burden. Plaintiff notes that "the Commissioner cannot rely on the absence of contradiction to support an RFC assessment." Plaintiff's Brief at 4. Plaintiff asserts that the ALJ referred to no specific evidence to support his RFC assessment and therefore his assessment is improper.

The record does not indicate that the ALJ relied on "an absence of evidence" in the record. The record contains an RFC Assessment indicating Plaintiff is capable of lifting ten pounds, standing two hours, sitting two hours, and occasionally climbing, stooping, or crouching. [R. at 80].

TREATING PHYSICIAN STANDARD

Plaintiff notes that she was treated for back pain and underwent two back surgeries by Dr. Boxell. Plaintiff observes that her treating physician, on May 4, 1995, was of the opinion that Plaintiff could not return to employment, that Plaintiff was unable to maintain the required sitting or standing requirements of employment, that Plaintiff would have to frequently change positions, and that Plaintiff would be forced to lie down at intervals throughout the day. Plaintiff additionally noted that Dr. Boxell, on August 17, 1994, concluded that Plaintiff would require at least six to twelve months to recuperate from her back surgeries. Plaintiff argues that a treating physician's opinion is entitled to great weight. Plaintiff notes that the ALJ attempted to discredit Dr. Boxwell's opinion because Dr. Boxell "stated that Plaintiff was capable

of 'light' work activity. . . . [but] nothing in the record . . . indicate[s] Dr. Boxwell's definition of 'light work.'" Plaintiff's Brief at 4.

With respect to Dr. Boxell's opinion, the ALJ's decision provides the following:

> The Administrative Law Judge recognizes that Dr. Boxell opined the claimant could not engage in substantial work due to her inability to sit for longer than 30 minutes and her inability to stand or walk for very long. However, the level of limitation indicated by Dr. Boxell is not supported by his objective medical findings, but appears to be based on the claimant's subjective complaints. Dr. Boxell indicated by his objective findings, the claimant could be released to return to light work activity. In August 1994, he stated that if the claimant's fusion appeared to have taken on her next evaluation, he anticipated she would be released to return to light duty work. In September 1994, Dr. Boxell's progress notes reflect that X-rays revealed a solid fusion; however, based on the claimant's subjective complaints, she was not released to return to work.

[R. at 18]. The ALJ's appears to have discounted the opinion of the treating physician, in part, because the treating physician noted that if Plaintiff's back surgery resulted in a solid fusion she could return to "light duty work," and that her records indicated that she did achieve solid fusion. The ALJ therefore concludes that based on the treating physician's records, Plaintiff should be able to, objectively, return to "light duty work." The ALJ's analysis has some logical appeal. However, he disregards portions of the treating physician's opinion in which the physician described what he meant by "light duty work." On August 17, 1994, Dr. Boxell wrote:

> I do not anticipate releasing her to return to work before September 15, 1994. If her fusion appears to have taken on our next evaluation, I anticipate that she might be able to return to light duty work. In particular, she would probably be asked to work half days initially. Her previous

> job required prolonged sitting. I do not think that she can do that at this time. It may be another six to twelve more months before she can sit comfortably for a full day. If she does return to work, even at light duty, within the near future, she will need frequent changes in position, a very good orthopedic chair, and appropriate breaks. She will not be allowed to do any heavy lifting at any time for another six to twelve months. She will not be allowed to do any bending or stooping at any time in the near future.

[R. at 160]. The doctor's opinion that fusion would permit Plaintiff to return to light duty work included working half days as "light duty."

A treating physician's opinion is entitled to great weight. See Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the claimant); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). However, a treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). If an ALJ disregards a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). In Goatcher v. United States Dep't of Health & Human Services, 52 F.3d 288 (10th Cir. 1995), the Tenth Circuit outlined factors which the ALJ must consider in determining the appropriate weight to give a medical opinion.

> (1) the length of the treatment relationship and the frequency of examination; (2) the nature and extent of the treatment relationship, including the treatment provided and the kind of examination or testing performed; (3) the degree to which the physician's opinion is supported by relevant

> evidence; (4) consistency between the opinion and the record as a whole; (5) whether or not the physician is a specialist in the area upon which an opinion is rendered; and (6) other factors brought to the ALJ's attention which tend to support or contradict the opinion.

Id. at 290; 20 C.F.R. § 404.1527(d)(2)-(6).

In this case, the ALJ did not address the above factors. Instead, the ALJ noted that the treating physician concluded Plaintiff might be able to return to light duty work if Plaintiff's bone properly fused. Based on records that Plaintiff's bone had fused, the ALJ concluded Plaintiff's treating physician's conclusion that Plaintiff could still not work was based on subjective rather than objective findings. The ALJ's opinion does not fully explore the initial statements of the treating physician. The treating physician's opinion of what constitutes "light duty work" is quite limited. The premise upon which the ALJ bases his opinion seems flawed. In addition, the ALJ gives no other reasons for discounting the opinion of the treating physician.

EVALUATION OF CREDIBILITY AND CLOSED PERIOD OF DISABILITY

Plaintiff asserts that the ALJ erred in failing to consider Plaintiff's pain and limited mobility. Plaintiff contends that the ALJ's findings regarding Plaintiff's credibility are not linked to the evidence as required by Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995). Plaintiff additionally asserts that the ALJ erred in failing to consider Plaintiff's work history and her two serious back surgeries. Plaintiff further states that the ALJ should have considered whether or not Plaintiff was entitled to a "closed period of disability" during the period of time in which she recuperated from her back surgeries.

Plaintiff states that she initially had back surgery in July 1993, that this surgery was not successful, and that she had subsequent surgery in March of 1994. Plaintiff observes that the ALJ at no time evaluated whether Plaintiff qualified for a "closed period of disability." On remand, if the ALJ concludes Plaintiff is not disabled, the ALJ should additionally determine whether or not Plaintiff was disabled for any consecutive twelve month period.

HYPOTHETICAL QUESTION POSED TO VOCATIONAL EXPERT

Plaintiff asserts that the ALJ did not properly assess Plaintiff's RFC, and presented an improper RFC to the vocational expert. Plaintiff states that the vocational expert's testimony cannot constitute substantial evidence to support the opinion of the Commissioner because it was based on an improper hypothetical question.

Because the Court has concluded that this action must be reversed and remanded to the Commissioner, the Court does not further evaluate the hypothetical question presented to the vocational expert. However, an ALJ need include only those limitations in the question to the vocational expert which he properly finds are established by the evidence. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). On remand the ALJ need only insure that the limitations, if any, which the ALJ concludes Plaintiff has are included in the hypothetical question presented to the vocational expert.

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this opinion. In particular, the ALJ should re-evaluate the treating physicians opinion. In addition, if the ALJ concludes Plaintiff is not disabled, the ALJ should additionally address whether or not Plaintiff is entitled to a closed period of disability.

Dated this 13 day of November 1998.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

DAVID CLARENCE FISHER and TUYET FISHER,

Debtor,

SALLIE MAE LOAN SERVICING CENTER,

Appellant,

vs.

DAVID CLARENCE FISHER and TUYET FISHER aka Tuyet Anh Nguyen-Fisher aka Ann Fisher,

Appellee.

Case No. 97-CV-1109-H(M)

ORDER

This matter comes before the Court on appeal from the United States Bankruptcy Court for the Northern District of Oklahoma. The appeal was referred to a United States Magistrate Judge for report and recommendation. Magistrate Judge McCarthy's Report and Recommendation (Docket # 7) and Appellant Sallie Mae Loan Servicing Center's ("Sallie Mae's") Objection To Report and Recommendation of United States Magistrate Judge (Docket # 9) are before the Court.

On appeal Sallie Mae asserts that the Bankruptcy Court erred as a matter of law in discharging the bulk of debtors' $112,446.58 indebtedness on federally insured student loans owed to Sallie Mae on the basis that it would be an undue hardship to deny partial discharge of the obligation. Sallie Mae argues that the subject student loan was a "HEAL" loan made under the Health Education Assistance Loan Program. Such loans may be discharged only where the debtor has been in repayment for more than seven years, and only upon finding that repayment would be unconscionable. 42 U.S.C. § 292f(g).

In his Report and Recommendation, the magistrate judge found that the issues Sallie Mae asserts on appeal were not raised with the Bankruptcy Court and therefore could not be addressed on appeal, except for the most manifest error, which the magistrate judge found lacking in this case. Sallie Mae did not introduce any evidence to the Bankruptcy Court suggesting that the loan in question was a HEAL loan; there was no evidence submitted or argument made concerning the length of time the loan had been in repayment; and there was no argument suggesting that an unconscionable standard should apply. However, the order signed by the Bankruptcy Court contains a finding that the loan is a HEAL loan and that it would be unconscionable to deny discharge. The magistrate judge found that the findings contained within the Bankruptcy Court Order were clearly erroneous as they did not accurately reflect the evidence presented or the decision announced by the Court on the record at the conclusion of the bankruptcy hearing and explicitly contradicted the oral findings made by the Bankruptcy Court. The magistrate judge recommended that this Court modify the Bankruptcy Court Order to conform to the decision announced at the conclusion of the bankruptcy hearing as reflected in the hearing transcript.

In its objection to the Report and Recommendation Sallie Mae acknowledges that there is no mention in the trial transcript that the debts sought to be discharged were HEAL loans or that the standards applicable to such loans were relevant. Sallie Mae argues that even though these issues are raised for the first time on appeal, the Court should exercise its discretion and consider its arguments on the merits. The Court declines Sallie Mae's invitation to address issues that were not raised before the Bankruptcy Court. Although the matter of what questions may be taken up and resolved for the first time on appeal is largely a matter of the Court's discretion, when parties propound new arguments on appeal in an attempt to prompt reversal of a trial court, important

judicial values are undermined. Tele-Communications, Inc. v. Commissioner of Internal Revenue, 104 F.3d 1229, 1231-32 (10th Cir. 1997).

In accordance with 28 U.S.C. § 636 and Fed.R.Civ.P. 72(b), the Court has reviewed the magistrate judge's report and recommendation de novo. The Court finds that the magistrate's report accurately reflects the parties' positions and the proceedings before the Bankruptcy Court. The Court adopts the magistrate's finding that the findings and holding memorialized in the Bankruptcy Court's Order filed December 18, 1996, are clearly erroneous. Further, the Court finds that it may exercise its power under Bankr. Rule 8013 to modify the Bankruptcy Court Order to conform with the decision announced by the Bankruptcy Court at pages 25 and 26 of the trial transcript.

Accordingly, based upon a careful review of the Report and Recommendation of the Magistrate Judge, Appellant's objection, and Appellees' response, the Court finds that the Report and Recommendation granting Appellees' motions to dismiss (Docket # 7) should be adopted.

IT IS SO ORDERED.

This 12TH day of November, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GREGORY DOUGLAS WILLIAMS,)
)
Petitioner,)
vs.) No. 98-CV-582-K (M)
)
KEN KLINGLER, Warden,)
Respondent.)

ORDER

On August 7, 1998, Petitioner submitted for filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 along with a motion for leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a). By Order dated August 25, 1998, the Court denied Petitioner's motion for leave to proceed *in forma pauperis*, directed Petitioner to pay the filing fee in the amount of $5.00 by September 26, 1988, and stated that "failure to comply . . . may result in dismissal of this action without prejudice and without further notice." To date, Petitioner has neither submitted the filing fee nor shown good cause in writing for his failure to comply with the Court's order. In addition, no correspondence to Plaintiff from the Court has been returned.

Because Petitioner has failed to pay the $5.00 filing fee in compliance with the Court's Order of August 25, 1998, the Court finds this habeas action may not proceed and should, therefore, be dismissed without prejudice for failure to prosecute.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's petition for writ of habeas corpus is **dismissed without prejudice** for lack of prosecution.

SO ORDERED this 12 day of November, 1998.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

THE HOME-STAKE OIL & GAS COMPANY and THE HOME-STAKE ROYALTY CORPORATION,	)	ENTERED ON DOCKET NOV 12 1998
Plaintiffs,	)	
vs.	)	No. 93-C-303-H
HOME-STAKE ACQUISITION CORPORATION, a Delaware corporation, ENVIROMINT HOLDINGS, INC., a Florida corporation f/k/a TRI TEXAS, INC., INTERNATIONAL INSURANCE INDUSTRIES, INC., a Delaware corporation, SUMMIT PARTNERS MANAGEMENT CO., a Texas corporation, CHARLES S. CHRISTOPHER, an individual, MICHAEL J. EDISON, an individual sometimes d/b/a International Insurance Industries, Inc., AGO COMPANY and AGR CORPORATION,	)	FILED NOV 10 1998 Phil Lombardi, Clerk U.S. DISTRICT COURT
Defendants.	)	

JOURNAL ENTRY OF JUDGMENT
DENYING MOTION FOR NEW TRIAL

NOW on this 10th day of November, 1998 there came on for consideration the following pleadings filed by M. Tom Christopher:

1. M. Tom Christopher's Motion for "New Trial", Motion for Stay Pending Appeal, Motion for Other Relief, and Brief in Support ("Motion for new Trial") filed on or about April 13, 1998;

2. M. Tom Christopher's Response to the Court's April 15, 1998 Order ("Supplemental Motion #1") filed on or about May 28, 1998;

3. Tom Christopher's Reply Concerning the April 15, 1998 Order ("Supplemental Motion #2) filed on or about July 1, 1998; and

4. Tom Christopher's Report Concerning the Larry Jasper Deposition ("Supplemental Motion #3") filed on or about September 18, 1998.

The Court, having reviewed the submissions, pleadings and proffered evidence by M. Tom Christopher including the deposition transcript of Larry Jasper, made certain findings set forth in the Court's Order filed October 27, 1998. Based on such findings the Court enters judgment as follows:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the claims of M. Tom Christopher in this matter, because they were supported by false statements, are hereby stricken.

IT IS FURTHER ORDERED that the Motion for New Trial and Supplemental Motions #1, #2 and #3 filed by M. Tom Christopher are hereby denied.

IT IS FURTHER ORDERED that the Stay of Execution imposed by this Court's Order of April 15, 1998 is hereby lifted and the Plaintiffs, as Judgment Creditors, are authorized to proceed with execution on the stock at issue in this matter.

HONORABLE SVEN ERIK HOLMES,
UNITED STATES DISTRICT JUDGE

Approved as to form:

Francis Majorie
MAJORIE & ASSOCIATES
12750 Merit Drive, Suite 1000
Dallas, Texas 75251
ATTORNEY FOR M. TOM CHRISTOPHER

Timothy T. Trump
CONNER & WINTERS
3700 First Place Tower
15 East 5th Street
Tulsa, Oklahoma 74103-4344
ATTORNEY FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERRYE ADAMS,

Plaintiff,

v.

GOOD SHEPHERD HOSPICE, L.L.C.,

Defendant.

ENTERED ON DOCKET

DATE 11-12-98

Case No. 97-CV-984-H

FILED

NOV 10 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for a trial by jury on November 2-5, 1998. On November 5, 1998, the jury returned its verdict finding Defendant Good Shepherd Hospice, L.L.C., not liable on Plaintiff Terrye Adam's claim of hostile work environment sexual harassment.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendant and against Plaintiff.

IT IS SO ORDERED.

This 10TH day of November, 1998.

Sven Erik Holmes
United States District Judge

ENTERED ON DOCKET

DATE 11-12-98

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARY L. DAVIS, et al,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendants.

FILED

NOV 10 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE NO. 98-CV-312-H(J)

ORDER

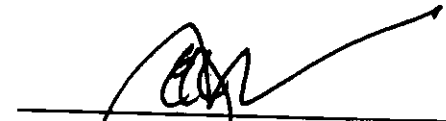
This matter comes on before the Court upon the Stipulation of all parties and the court being fully advised in the premises ***ORDERS, ADJUDGES AND DECREES*** *that all claims asserted herein by plaintiffs, Gary L. Davis and Robert Cowan, against the defendant, United States of America, are hereby dismissed with prejudice, the parties to bear their own costs and attorneys' fees.*

DATED THIS 10th *day of* November, *1998.*

UNITED STATES DISTRICT JUDGE

GARY L. DAVIS, et al,
Case NO. 98-CV-312-H(J)

APPROVED AS TO FORM AND CONTENT:



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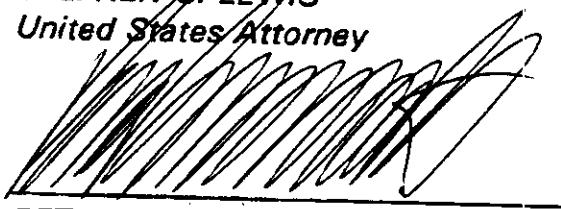

PETER BERNHARDT OBA #741
Assistant United States Attorney
333 W. Fourth St., Ste. 3460
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(918) 581-7463

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARY E. DUPLER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 98-CV-44-H (W)**
	)	
WORLDCOM, INC.,	)	
a Georgia corporation,	)	
	)	
Defendant.	)	

ORDER OF DISMISSAL WITH PREJUDICE

On this day, came on for consideration the Joint Motion to Dismiss of plaintiff, Gary E. Dupler, and defendant, WorldCom, Inc. The Court, after considering the motion and the other papers on file in this matter, finds that the parties have fully compromised and settled their disputes in this action. Therefore, this matter should be dismissed.

IT IS, THEREFORE, ORDERED ADJUDGED AND DECREED that all of plaintiff's claims against defendant are dismissed with prejudice and all of defendant's claims against plaintiff are dismissed with prejudice. Each party shall bear his/its costs of suit.

DATED: November 10, 1998.

SVEN ERIK HOLMES
DISTRICT COURT JUDGE

Agreed as to Form and Substance:

RHODES, HIERONYMUS, JONES, TUCKER & GABLE

By: _____

John H. Tucker, OBA No. 9110
Jo Anne Deaton, OBA No. 5938
100 W. Fifth St., Suite 400
Tulsa, OK 74121

Attorneys for Plaintiff

NICHOLS, WOLFE, STAMPER, NALLY, FALLIS & ROBERTSON, INC.

By: _____

S. M. Fallis, Jr., OBA No. 2813
Trent A. Gudgel, OBA No. 16800
124 E. 4th Street
Tulsa, OK 74103-5010

Attorneys for Defendant

G:\5302\001\DOC\ORD-DIS.WPD

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

NORTH AMERICAN GALVANIZING COMPANY, a corporation,

Plaintiff,

v.

ABB SISTEMAS, S.A de C.V., a corporation,

Defendant.

Case No. 98-CV-497-H(M)

ORDER

This matter comes before the Court on Defendant ABB Sistemas, S.A. de C.V.'s ("ABB Sistemas'") Special Appearance and Motion to Dismiss the Complaint or, in the Alternative, to Quash Service of Process (Docket # 3) and Special Appearance and Motion to Dismiss for Lack of Personal Jurisdiction (Docket # 2). In this action, Plaintiff North American Galvanizing Company ("NAGC") contends that ABB Sistemas breached the agreement it reached with NAGC for galvanizing services at its lattice tower fabrication shop in Monterrey, Mexico. For the reasons expressed herein, the Court concludes that ABB Sistemas' Motion to Dismiss for Lack of Personal Jurisdiction should be granted.

I

Defendant ABB Sistemas is a Mexico corporation engaged in the business of building transmission towers. Plaintiff NAGC is a Delaware corporation in the business of hot dip galvanizing services and has two galvanizing facilities and its senior management and accounting offices in Tulsa, Oklahoma. NAGC also maintains offices and galvanizing plants in Texas.

In 1997, ABB Sistemas and NAGC entered into an agreement under which NAGC was to

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galvanize 1300 metric tons of steel parts which were to be constructed into transmission towers by ABB Sistemas. Prior to the execution of this agreement and in the course of negotiations, NAGC representatives from Houston, Texas traveled to ABB Sistemas' facility in Monterrey, Mexico to inspect the materials it would be galvanizing were the agreement to occur. ABB Sistemas representatives also traveled to Houston, Texas during the negotiations. The agreement was executed in Houston, Texas, and contained a choice of law provision favoring Texas law. As envisioned by the agreement, the steel parts were shipped from Monterrey, Mexico to Houston, Texas, where the galvanizing was performed and the parts were inspected. As provided by the agreements, payment for galvanizing services rendered was made to an Oklahoma bank.

ABB Sistemas is not licensed to do business in the state of Oklahoma and has no offices or employees in the state of Oklahoma. ABB Sistemas representatives did not travel to Oklahoma during the negotiation of the agreement.

II

Defendant ABB Sistemas has moved to dismiss this action against it on the grounds that this Court lacks personal jurisdiction and that service was improper. The Court first addresses the question of personal jurisdiction over ABB Sistemas and assumes, for purposes of the motion, that service was proper under Fed. R. Civ. P. 4(h).

With regard to whether Defendants are subject to personal jurisdiction in Oklahoma:[1]

> [t]he plaintiff bears the burden of establishing personal jurisdiction over the defendant. Prior to trial, however, when a motion to dismiss for lack of jurisdiction is decided on the

[1] The Court applies the law of the forum state, in this case, Oklahoma, to determine whether it has jurisdiction over a nonresident defendant in a lawsuit based on diversity of citizenship. Federated Rural Elec. Ins. Corp. v. Kootenai Elec. Co-op., 17 F.3d 1302, 1304 (10th Cir. 1994); see also Fed. R. Civ. P. 4(e).

> basis of affidavits and other written materials, the plaintiff need only make a prima facie showing. The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party.

Rambo v. American Southern Ins. Co., 839 F.2d 1415, 1417 (10th Cir. 1988) (citations omitted). Thus, the Court must "determine whether the plaintiff's allegations, as supported by affidavits, make a prima facie showing of the minimum contacts necessary to establish jurisdiction over each defendant." Id.

"The test for exercising long-arm jurisdiction in Oklahoma is to determine first whether the exercise of jurisdiction is authorized by statute and, if so, whether such exercise of jurisdiction is consistent with the constitutional requirements of due process. In Oklahoma, this two-part inquiry collapses into a single due process analysis, as the current Oklahoma long-arm statute provides that '[a] court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States.'" Id. at 1416 (citations omitted).

The Rambo court stated that:

> [j]urisdiction over corporations may be either general or specific. Jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum state is "specific jurisdiction." In contrast, when the suit does not arise from or relate to the defendant's contacts with the forum and jurisdiction is based on the defendant's presence or accumulated contacts with the forum, the court exercises "general jurisdiction."

839 F.2d at 1418 (citations omitted); Doe v. Nat'l Med. Servs., 974 F.2d 143, 145 (10th Cir. 1992) ("Specific jurisdiction may be asserted if the defendant has 'purposefully directed' its activities toward the forum state, and if the lawsuit is based upon injuries which 'arise out of' or

'relate to' the defendant's contacts with the state."). The Supreme Court has explained that:

> [j]urisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the foreign state . . . it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communication across state lines, thus obviating the need for physical presence within a state in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another state, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction.

Burger King, 471 U.S. at 476.

Three criteria guide the Court's determination of whether personal jurisdiction exists: (1) in relation to the plaintiff's claim, the defendants must have purposefully availed themselves of the privilege of conducting activities in Oklahoma, Henson v. Denckla, 357 U.S. 235, 253 (1958); (2) for specific jurisdiction, the cause of action must arise from the defendants' activities in Oklahoma; and (3) the acts or the consequences of the acts of the defendants must have a substantial enough connection with Oklahoma to make the exercise of jurisdiction reasonable, see LAK, Inc. v. Deer Creek Enters., 885 F.2d 1293, 1299 (6th Cir. 1989). Additionally, in cases involving multiple defendants, minimum contacts must be found as to each defendant over whom the court exercises jurisdiction. Calder v. Jones, 465 U.S. 783, 790 (1984).

III

Plaintiff contends that specific personal jurisdiction over Defendant is proper in Oklahoma since Defendant purposefully directed its activities at Plaintiff, which has its principal place of business in Oklahoma. Plaintiff further intimates in its supplemental filings that Defendant's advertising activities subject it to general personal jurisdiction.

Specifically, Plaintiff contends that Defendant is subject to specific personal jurisdiction in Oklahoma based on 1) Defendant's imputed knowledge of NAGC's domicile through its

payments to an Oklahoma bank and the letterhead of NAGC's price quote for the galvanizing which listed the two Tulsa NAGC facilities; 2) Defendant's request and receipt of an open line of credit, the final approval of which was made at the Tulsa, Oklahoma headquarters of NAGC; and 3) Defendant's retainer of Oklahoma counsel to represent it in the instant action and a prior action.

Based upon a review of the record, the Court finds that Defendant ABB Sistemas is not subject to specific personal jurisdiction in Oklahoma. First, Defendant's payments to the Oklahoma bank and Plaintiff's decision to extend credit to Defendant in its Oklahoma office are legally insignificant for purposes of personal jurisdiction. It is undisputed that the payments to the Oklahoma bank by Defendants were made at the direction of Plaintiff, and there is no evidence in the record which indicates Defendant had any direct contact with the Oklahoma office in its application for credit. Thus, Plaintiff's unilateral act of directing payment to Oklahoma and extending a line of credit in Oklahoma cannot create contacts upon which jurisdiction may be based.. See Hough v. Leonard, 867 P.2d 438, 442 n.11 (Okla. 1993). Secondly, though Plaintiff's letterhead does indicate NAGC has offices in Oklahoma, it also lists all other NAGC offices, which are located in several states. The record nowhere indicates that NAGC's letterhead imparted the information which Plaintiff suggests it does, and Plaintiff cites no authority, nor could it, that a defendant may be subject to personal jurisdiction in any state where Plaintiff has offices. Finally, the Court rejects outright the notion that Defendant's retention of counsel in this or any other matter may subject it to personal jurisdiction. Simply stated, there is no evidence that Defendant "purposefully directed" any activities toward

Oklahoma. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 480 n.22 (1985).[2]

Moreover, in its supplemental brief, Plaintiff appears to contend that general jurisdiction over Defendant may exist. Specifically, Plaintiff alleges that Defendant has attempted to solicit business in Oklahoma by advertising in the September 1998 issue of "Transmission and Distribution World," an electric power industry publication.

Based on a review of the record, the Court finds that the record does not support an exercise of general jurisdiction over the Defendant. The Court initially notes that the advertisement Plaintiff relies upon is for a company named ABB Power T&D Company, not ABB Sistemas. Plaintiff has provided no evidence whatsoever that would establish that ABB Power T&D Company, which is not a party to this action, is somehow affiliated with ABB Sistemas and that the acts of the affiliate should be imputed to ABB Sistemas for purposes of personal jurisdiction. Accordingly, the Court finds that there is not a sufficient basis for general personal jurisdiction in Oklahoma. The above-referenced contacts with Oklahoma are simply not sufficient to obviate the need for a relationship between these contacts and the subject matter of this lawsuit. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-15 & n.9 (1984). ABB Sistemas has not maintained an office in Oklahoma, held any property in Oklahoma, or engaged in any activity in Oklahoma of a systematic and continuous nature. Id. at 415-16. It is clear from the record that ABB Sistemas' activities in Oklahoma do not create a substantial enough connection with the forum state that they should reasonably anticipate being

[2]Plaintiff's reliance on Ferrell v. Prairie Int'l Trucks, 935 P.2d 286 (Okla. 1997), is misplaced. Ferrell involved an out-of-state seller of trucks who advertised and solicited Oklahoma buyers, negotiated a sale of a truck to an Oklahoma buyer knowing the truck would be used in Oklahoma. See id. at 288. Here, Defendant is an out-of-state buyer of services, and there is no indication that Defendant purposefully availed itself of Oklahoma's benefits for purposes of developing and encouraging relationships with Oklahoma entities.

haled into court here. See World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980) (citing cases).

Based on the above, ABB Sistemas' Motion to Dismiss for Lack of Personal Jurisdiction (Docket # 2) is hereby granted. Accordingly, ABB Sistemas' Motion to Dismiss the Complaint or, in the Alternative, to Quash Service of Process (Docket # 3) is rendered moot.

IT IS SO ORDERED.

This 10th day of November, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF THE STATE OF OKLAHOMA

MEMBER SERVICES LIFE INSURANCE COMPANY, doing business as MEMBER SERVICE ADMINISTRATORS, as Third Party Administrator of the LIBERTY GLASS COMPANY ERISA QUALIFIED EMPLOYEE BENEFIT PLAN,	)	ENTERED ON DOCKET DATE NOV 12 1998
Plaintiff,	)	Case No. 95-C-0027-H
vs.	)	
AMERICAN NATIONAL BANK & TRUST COMPANY OF SAPULPA, as Guardian of WILLIAM BROOKS BALTHIS, DEBRA LEANNE BALTHIS and DAVID DOUGLAS BALTHIS; E. TERRILL CORLEY; THOMAS F. GANEM; STEPHEN R. CLARK; BRADFORD J. WILLIAMS; and WALTER M. JONES,	)	FILED NOV 10 1998 Phil Lombardi, Clerk U.S. DISTRICT COURT
Defendants.	)	

JUDGMENT

On the 29th day of September, 1998, this matter came on for hearing, and for entry of a final judgment in accord with the decision of the Tenth Circuit Court of Appeals in this cause on the 15th day of December, 1997, modifying the Order and Judgment, and Supplemental Judgment, previously entered by this Court. In consideration of the findings of this Court, as modified by the Court of Appeals, the Court enters the following declarations of rights and judgment, to-wit:

1. Plaintiff Member Services Life Insurance Company, doing business as Member Service Administrators, as Third Party Administrator of the Liberty Glass Company ERISA Qualified Employee Benefit Plan ("MSA"), is entitled to recover from Defendant American National Bank & Trust Company of Sapulpa, as Guardian of William Brooks Balthis, Debra Leanne Balthis and David D. Balthis ("ANB") those benefits paid

under said ERISA Plan subsequent to the amendment of the Plan on January 1, 1993, but shall have no right to recover any benefits paid by the Plan prior to the January 1, 1993 Plan Amendment.

2. The Liberty Glass Company ERISA Qualified Employee Benefit Plan shall have no obligation or liability to pay Plan benefits to or for the benefit of William Brooks Balthis, Debra Leanne Balthis and David D. Balthis by reason of the injuries, disabilities and damages suffered by the Balthis children in a fire on February 2, 1998 caused by a defective BIC lighter until such time as the total expenses which would otherwise be payable as benefits under the Plan incurred by each beneficiary from and after January 1, 1993 exhausts the proceeds of said beneficiary's individual judgment as follows:

William Brooks Balthis	$3,073,588.84
Debra Leanne Balthis	$3,077,644.22
David D. Balthis	$3,024,421.74

3. Subsequent to the January 1, 1993 Plan amendment, the Plan paid $49,505.92 for the benefit of William Brooks Balthis, Debra Leanne Balthis and David D. Balthis, for which Plaintiff is entitled to recovery against ANB, together with interest at the rate of 18% per annum upon said sum from the 8th day of August, 1994 through the date of this Court's original judgment on April 4, 1996, in the amount of $14,768.05, and $643.87 in post-judgment interest at the rate of 5.46% for interest accrued through the date of payment of said judgment by ANB to Plaintiff on June 11, 1996. The Court additionally awarded Plaintiff $14,563.50 in attorney's fees, and $1,005.65 in costs, in its previous judgment, which awards were not challenged or modified on

appeal. The Court therefore finds that MSA is entitled to judgment against ANB for the total sum of $80,486.99.

4. MSA and ANB shall, except as otherwise set forth herein, bear their own costs and attorney's fees incurred in this litigation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff Member Services Life Insurance Company, doing business as Member Service Administrators, as Third Party Administrator of the Liberty Glass Company ERISA Qualified Employee Benefit Plan shall have no obligation or liability to pay Plan benefits to or for the benefit of William Brooks Balthis, Debra Leanne Balthis and David D. Balthis by reason of the injuries, disabilities and damages suffered by the Balthis children in a fire on February 2, 1998 caused by a defective BIC lighter until such time as the total expenses which would otherwise be payable as benefits under the Plan incurred by each beneficiary from and after January 1, 1993 exhausts the proceeds of said beneficiary's individual judgment as follows:

William Brooks Balthis	$3,073,588.84
Debra Leanne Balthis	$3,077,644.22
David D. Balthis	$3,024,421.74

2. Plaintiff Member Services Life Insurance Company have judgment against Defendant American National Bank & Trust Company of Sapulpa, as Guardian of William Brooks Balthis, Debra Leanne Balthis and David D. Balthis, in the total sum of $80,486.99.

Dated this 10th day of November, 1998.

The Honorable Sven Erik Holmes
Judge of the United States District Court

APPROVED AS TO FORM:

Phil R. Richards, Esq.
Thomas D. Hird, Esq.

ATTORNEYS FOR PLAINTIFF
MEMBER SERVICES LIFE INSURANCE COMPANY,
DOING BUSINESS AS MEMBER SERVICE
ADMINISTRATORS, AS THIRD PARTY ADMINISTRATOR
OF THE LIBERTY GLASS COMPANY ERISA QUALIFIED
EMPLOYEE BENEFIT PLAN

Sam T. Allen, III, Esq.
Sam T. Allen, IV, Esq.

ATTORNEYS FOR DEFENDANT
AMERICAN NATIONAL BANK & TRUST COMPANY
OF SAPULPA, AS GUARDIAN OF WILLIAM
BROOKS BALTHIS, DEBRA LEANNE BALTHIS
AND DAVID DOUGLAS BALTHIS

prr/4680/judgment.3

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

AUNDRAY WALLER,
SSN: 448-80-7971

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-CV-929-J

JUDGMENT

This action has come before the Court for consideration and an Order reversing the Commissioner's denial of benefits and remanding the case to the Commissioner for further proceedings has been entered. Consequently, Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 10 day of November 1998.

Sam A. Joyner
United States Magistrate Judge

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

(12)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

AUNDRAY WALLER,
SSN: 448-80-7971

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-CV-929-J

ORDER[2/]

Plaintiff, Aundray Waller, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.[3/] Plaintiff asserts that the Commissioner erred because Plaintiff meets a Listing and the ALJ failed to conclude that Plaintiff was disabled. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

[2/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

[3/] Administrative Law Judge R.J. Payne (hereafter "ALJ") concluded that Plaintiff was not disabled on March 25, 1996. [R. at 10]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on August 6, 1997. [R. at 3].

(11)

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on February 9, 1978, and was 18 years old at the time of the hearing before the ALJ. The record includes several scores from various IQ examinations administered to Plaintiff. Both Plaintiff and Defendant agree that Plaintiff has a verbal, performance or full scale IQ score of between 60 and 70 on the examinations.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The statutes and regulations in effect at the time of the ALJ's decision required application of a four-step evaluation process.[4/] See 42 U.S.C. § 1382c(a)(3)(A)(1994); 20 C.F.R. § 416.924(b)(1994).

After the ALJ's decision, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act. Pub. L. No. 104-193, 110 Stat. 2105. This Act amended the substantive standards for the evaluation of children's disability claims. The statute currently reads:

> An individual under the age of 18 shall be considered disabled for the purpose of this subchapter if that individual had a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has

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[4/] Evaluation of the disability of a child followed a four-step process. First, the Commissioner determined whether the minor was engaged in substantial gainful activity. If he is, the minor was considered not disabled. If the minor was not engaged in substantial gainful activity, the Commissioner then determined whether the minor's impairment was severe. If the impairment was not severe, the minor was considered not disabled. If the minor's impairment was severe, the Commissioner then determined whether the minor had an impairment that met or equaled the severity of one of the impairments listed at 20 C.F.R. Pt. 404, Subpt. P., App. 1 ("the Listings"). If the minor's impairment was of Listing severity, the minor was considered presumptively disabled. If the minor's impairment was not of Listing severity, the Commissioner was required to determine whether the impairment was of "comparable severity" to an impairment that would disable an adult. 20 C.F.R. § 416.924(b)-(f).

> lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. 1382c(a)(3)(C)(i). The notes following the Act provide that this new standard for the evaluation of children's disability claims applies to all cases which have not been finally adjudicated as of the effective date of the Act (August 22, 1996). This includes cases in which a request for judicial review is pending. Consequently, this new standard applies to the Plaintiff's case. See also Gertrude Brown for Khilarney Wallace v. Callahan, 120 F.3d 1133 (10th Cir. 1997) (applying new standards to a child's disability appeal).

The regulations which implement the Act provide:

> (d) *Your impairment(s) must meet, medically equal, or functionally equal in severity a listed impairment in appendix 1.*
> An impairment(s) causes marked and severe functional limitations if it meets or medically equals in severity the set of criteria for an impairment listed in the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter, or if it is functionally equal in severity to a listed impairment.
>
> > (1) Therefore, if you have an impairment(s) that is listed in appendix 1, or is medically equal in severity to a listed impairment, and that meets the duration requirement, we will find you disabled.
> > (2) If your impairment(s) does not meet the duration requirement, or does not meet, medically equal, or functionally equal in severity a listed impairment, we will find that you are not disabled.

20 C.F.R. § 416.924. Consequently, based on the applicable statutes and regulations, Plaintiff is disabled only if Plaintiff can establish that she meets a Listing.[5/] See also Brown, 120 F.3d 1133 at 1135 ("In reviewing the Commissioner's decision, therefore, we do not concern ourselves with his findings at step four of the analysis; we ask only whether his findings concerning the first three steps are supported by substantial evidence.").

III. ALJ'S DECISION

The ALJ determined that Plaintiff was not disabled. The ALJ noted Listing 112.05 and stated that "specific emphasis has been given" to that Listing. [R. at 15]. The ALJ concluded that Plaintiff did not meet a Listing, but provided no specific reasons or analysis for his conclusion.

IV. REVIEW

Plaintiff asserts that the ALJ erred because Plaintiff meets Listing 112.05. Plaintiff notes that he has an IQ score in the 60 to 70 range. Plaintiff states that this score and a second "marked" limitation of functioning in another area is all that is needed to meet the Listing. Plaintiff notes that the ALJ found that Plaintiff had a "moderate limitation in concentration, persistence, or pace in his ability to engage in an activity, such as studying or practicing a sport, and to sustain the activity for a period of time and at a pace appropriate to his age." Plaintiff's Brief at 4. Plaintiff

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5/ At step three, a claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1, commonly referred to as the "Listings." An individual who meets or equals a Listing is presumed disabled.

contends that he therefore meets Listing 112.05E because he has a valid medical diagnosis of mental retardation in addition to another significant limitation of function.

Defendant asserts that Plaintiff does not meet Listing 112.05D. Defendant does not address Plaintiff's argument with regard to Listing 112.05E. Defendant notes that Plaintiff does have an IQ of between 60 and 70. Defendant argues, however, that Plaintiff's other asserted "moderate limitation in concentration, persistence, or pace in his ability to engage in an activity, such as studying or practicing a sport, and to sustain the activity for a period of time and at a pace appropriate to his age," is a result of Plaintiff's mental retardation and does not constitute a separate limitation in addition to his IQ. Defendant refers to the unpublished Tenth Circuit Court of Appeals decision in Franklin v. Chater, 1996 WL 731591 (10th Cir. December 20, 1996).

Franklin addresses Listing 112.05C.[6/] The Franklin court noted that the parties did not dispute that the claimant's IQ was within the required Listing range. The Court continued:

> Claimant then points to medical reports that claimant suffers from marked restrictions in his ability to understand and remember detailed instructions and to interact appropriately with the public; cannot work under stressful conditions; cannot use good judgment in a work situation; would need close supervision, and has a limited intellectual capacity. Like the evidence of claimant's illiteracy, this evidence demonstrates symptoms of claimant's mental retardation, and does not satisfy claimant's obligation to

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6/ Although Franklin addresses Listing 112.05C, the Listing, at that time required "[a] valid verbal, performance, or full scale IQ of 60 through 70 *and* a physical or other mental impairment imposing additional and significant work-related limitation of function." Franklin at *2. This Listing is, under the current CFR, 112.05D.

> show an *additional* impairment meeting the second prong of listing § 112.05C.

Franklin, 1996 WL 731591 at *2, *3(italics in original). Pursuant to Franklin, Plaintiff's additional asserted impairment could be interpreted as a symptom of Plaintiff's mental retardation, and Plaintiff therefore does not meet the Listing.

Franklin addressed Listing 12.05C, which, in the current Listings is 112.05D. Defendant's argument (and Franklin) is based around Listing 112.05D. Plaintiff argues that he meets Listing 112.05E, not 112.05D. Listing 112.05 provides:

> *Mental Retardation and Autism:* Mental retardation refers to a significantly subaverage general intellectual functioning with deficits in adaptive behavior initially manifested during the developmental period (before age 22). . . . The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied.
> * * *
> D. A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing additional and significant work-related limitation of function;
>
> E. A valid verbal, performance, or full scale IQ of 60 through 70 and:
>
> > 1. For older infants and toddlers (age 1 to attainment of age 3), resulting in attainment of development or function generally acquired by children no more than two-thirds of the child's chronological age in either paragraphs B1a or B1c of 112.02; or
> >
> > 2. For children (age 3 to attainment of age 18), resulting in at least one of paragraphs B2b or B2c or B2d of 112.02;

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 112.05 (italics in original). Because Plaintiff was between the ages of 3 and 18, 112.05E(2) applies. This section requires an IQ of between 60 and 70, and it must result in at least one of B2b, B2c or B2d factors of § 112.02. The pertinent provisions of Section 112.02 provide:

> (B2)b. Marked impairment in age-appropriate social functioning, documented by history and medical findings (including consideration of information fro parents or other individuals who have knowledge of the child, when such information is needed and available) and including, if necessary, the results of appropriate standardized tests; or
>
> (B2)c. Marked impairment in age-appropriate personal functioning, documented by history and medical findings (including consideration of information from parents or other individuals who have knowledge of the child, when such information is needed and available) and including, if necessary, appropriate standardized tests; or
>
> (B2)d. Deficiencies of concentration, persistence, or pace resulting in frequent failure to complete tasks in a timely manner.

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 112.02. Therefore, pursuant to Listing 112.05E, Plaintiff is disabled if Plaintiff has an IQ between 60 and 70 (this is acknowledged by both parties), and, if Plaintiff was between the ages of 3 and 18, the IQ "results" in one of the impairments described in 112.02. The impairments include marked social functioning, marked personal functioning, or deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner.

The language of Listing 112.05E is not the same as the wording in 112.05D. Listing 112.05D requires an IQ between 60 and 70 and a separate additional and

significant work-related limitation. Listing 112.05E requires an IQ of 60 to 70 and, for children between the ages of 3 and 18, "resulting in" one of the impairments referenced in 112.02.

Plaintiff asserts that the ALJ's finding that Plaintiff has the requisite IQ, and the ALJ's holding that Plaintiff has a "moderate limitation in concentration, persistence, or pace in his ability to engage in an activity, such as studying or practicing a sport, and to sustain the activity for a period of time and at a pace appropriate to his age," requires a conclusion that Plaintiff meets a Listing. Plaintiff's Brief at 4. Contrary to Plaintiff's assertion, the ALJ's holding does not require a finding that the Listing is met. However, Defendant's argument that Plaintiff does not meet a Listing pursuant to the unpublished decision in Franklin is likewise unavailing because Defendant does not address the additional issues presented by the application of 112.05E.

Because the ALJ did not specifically discuss his reasons that Listing 112.05 (or the factors in 112.02) were not met by Plaintiff in his Order, the Court concludes that this case must be reversed and remanded to the Commissioner. The law applicable to "children" changed between the time that the ALJ held a hearing on this case and wrote his opinion, and the time that the Plaintiff appealed the decision of the ALJ. Due to the new statutes, children are considered disabled only if they meet or equal a "Listing." As discussed above, the applicability of the Listings to this case requires additional development.

At step three of the sequential evaluation process, a claimant's impairment is compared to the Listings (20 C.F.R. Pt. 404, Subpt. P, App. 1). If the impairment is

equal or medically equivalent to an impairment in the Listings, the claimant is presumed disabled. A plaintiff has the burden of proving that a Listing has been equaled or met. Yuckert, 482 U.S. at 140-42; Williams, 844 F.2d at 750-51. Furthermore, in his decision, the ALJ is "required to discuss the evidence and explain why he found that [the claimant] was not disabled at step three." Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996).

As noted above, in this case, the ALJ merely stated that special consideration was given to Listing 112.05. This type of procedure is exactly what the Court of Appeals for the Tenth Circuit was critical of in Clifton. In Clifton the ALJ did not discuss the evidence or his reasons for determining that the claimant was not disabled at step three. As in Clifton, the ALJ in this case did not discuss the medical evidence in connection with his step three conclusion. In Clifton, the Tenth Circuit held that this type of a bare conclusion was beyond any meaningful judicial review. Clifton, 79 F.3d at 1009.

The Tenth Circuit held as follows:

> Under the Social Security Act,
>
> > [t]he Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based.

42 U.S.C. 405(b)(1). . . .

> This statutory requirement fits hand in glove with our standard of review. By congressional design, as well as by administrative due process standards, this court should not properly engage in the task of weighing evidence in cases before the Social Security Administration. 42 U.S.C. 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive."). . . . Rather, we review the [Commissioner's] decision only to determine whether her factual findings are supported by substantial evidence and whether she applied the correct legal standards. . .
>
> In the absence of ALJ findings supported by specific weighing of the evidence, we cannot assess whether relevant evidence adequately supports the ALJ's conclusion that [the claimant's] impairments did not meet or equal any Listed impairment, and whether he applied the correct legal standards to arrive at that conclusion. The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence. . . . Rather, in addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects. . . . Therefore, the case must be remanded for the ALJ to set out his specific findings and his reasons for accepting or rejecting evidence at step three.

Clifton, 79 F.3d at 1009-10 (internal case citations omitted).

Because no specific findings were made by the ALJ at Step Three, this Court is unable to properly review the Commissioner's decision and determine whether or not it was supported by substantial evidence.

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this Order.

Dated this 10 day of November 1998.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

COLLISION CENTERS INTERNATIONAL, INC., a Utah corporation, et al.

Plaintiffs,

vs.

COLLISION KING, INC., formerly known as Prodigy A.R.T. Corp., a Nevada corporation,

Defendant.

Case No. 98-CV-40-BU(J)

ORDER

This matter comes before the Court upon the parties' Joint Motion to Vacate Preliminary Injunction Ruling and to Stay Action Pending Arbitration. Upon due consideration, the Court ORDERS as follows:

1. The parties' Joint Motion to Vacate Preliminary Injunction Ruling (Docket Entry #50-1) is GRANTED. The May 18, 1998 ruling of United States Magistrate Judge Sam A. Joyner granting Plaintiffs' Motion for Preliminary Injunction is VACATED; and

2. The parties' Joint Motion to Stay Action Pending Arbitration (Docket Entry #50-2) is DENIED. Instead, the Court directs the Clerk of the Court to administratively close this matter in his records pending resolution of the arbitration proceedings. The parties are DIRECTED to notify the Court when

(51)

resolution of the arbitration proceedings has occurred so that the Court may reopen these proceedings, if necessary, for final resolution of this action.

Entered this 10th day of November, 1998.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT M. BOWERS, et. al., v. CITY OF TULSA POLICE CHIEF RON PALMER, et al.	)))))	CASE NO: 98 CV ~~0752~~ 732 (BU) M

PLAINTIFF'S STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiffs, by and through Counsel, and pursuant to Federal Rules of Civil Procedure, Rule 41(a) and stipulate to voluntarily dismiss without prejudice, the Defendant Mark Adam Traill for the reasons set forth below:

1. Defendant Mark Adam Traill is the Defendant in a criminal action in Rogers County District Court for the acts set forth in the Complaint.

2. Dismissal of Defendant Mark Adam Traill from this action is necessary to prevent jeopardizing the outcome of the pending Rogers County Criminal Proceedings

3. As of November 9, 1998, Defendant Mark Adam Traill has been named and not served in the above styled and referenced action.

4. After the criminal trial in Rogers County, Plaintiffs will assert the state claim in state court.

Respectfully submitted,

Kathy S. Fry, OBA #17285
Attorney for Plaintiffs
202 East Second Avenue, Suite 104
Owasso, Oklahoma 74055
Office : 918 274 3603
Fax: 918 272 4171

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
NOV 10 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	Case No. 98CV0551K(E)
JONATHON D. KNOERDEL, Defendant.	)	

ENTERED ON DOCKET
DATE 11/12/98

NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action with prejudice.

Dated this 10th day of November, 1998.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

Loretta F. Radford

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 10th day of November, 1998, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Jonathon D. Knoerdel, 14847 E. 82nd St., Tulsa, OK 74134.

Libbi L. Felty

Libbi L. Felty
Paralegal Specialist

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JERRY LEE DAVEY,

Plaintiff,

v.

ATLANTIC RICHFIELD COMPANY, and CHEVRON U.S.A. INC.,

Defendants.

Case No. 98-CV-0618B-(J)

NOTICE OF DISMISSAL WITHOUT PREJUDICE OF JERRY LEE DAVEY

Pursuant to Rule 41 (a) (1) of the Federal Rules of Civil Procedure, the Plaintiff, Jerry Lee Davey, by and through her attorney of record, James E. Frasier, of Frasier, Frasier & Hickman herewith dismisses without prejudice her claim in the above entitled cause.

Dated this 10th day of November, 1998.

Respectfully submitted,

FRASIER, FRASIER & HICKMAN

By: _____

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1700 Southwest Boulevard
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And

Robert N. Barnes OBA # 537
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(405) 843-0363

And

Jessie V. Pilgrim OBA # 11152
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Tulsa, OK 74114
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ATTORNEYS FOR THE PLAINTIFFS

CERTIFICATE OF MAILING

I hereby certify that on the 10th day of November, 1998, I mailed a true and correct copy of the foregoing instrument to:

Steven J. Adams
Attorney at Law
200 ONEOK Plaza
100 West Fifth Street
Tulsa, OK 74103-2929

Robert E. Meadows
Attorney at Law
Suite 800
333 Clay Avenue
Houston, TX 77002-4086

Mike Jones
Attorney at Law
116 N. Elm Street
Bristow, OK 74010

with proper postage thereon fully prepaid.

James E. Frasier